TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 18

THAD BENSON CARTER, PETITIONER,

vs.

GEORGE A. KUBLER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 19, 1943.

CERTIORARI GRANTED APRIL 5, 1943.

IN THE

United States Circuit Court of Appeals

For the Sixth Circuit

No. 9165

In the Matter of
THAD BENSON CARTER,
Farmer Debtor.

THAD BENSON CARTER,
Appellant.

v.

GEORGE A. KUBLER,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

TRANSCRIPT OF RECORD.

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Northern District of Ohio,
Eastern Division—ss:

Record of proceedings of the District Court of the United States within and for the Eastern Division of the Northern District of Ohio in the cause and matter hereinafter stated. Said action was commenced on the 21st day of December, 1934 and proceeded to final disposition on the 17th day of November, 1941 and during the progress thereof pleadings and papers were filed, process was issued and returned and orders of the court were made and entered in the order and on the dates heretofore stated, to-wit:

Present: The Honorable Paul Jones
United States District Judge

Designation of Contents of Record on Appeal.

(Filed January 9, 1942)

To George A. Kubler:

The appellant, Thad Benson Carter, designates the following portions of the record and proceedings to be contained in the record on appeal of the above entitled cause.

The clerk will please prepare a certified typewritten transcript of the record in duplicate. In conformity with Rule 75(e) of the Rules of Civil Procedure, and with the Rules of the Appellate Court which adopt said Rule 75(e), and with Rules 10(2) and 38(8) of the Supreme Court the Clerk will please avoid all duplications of matter, making proper cross references, and omit all captions of documents, all proofs of service and verifications, substituting brief references thereto.

1. Title page.

2. Caption.

3. All docket entries on the clerk's bankruptcy docket.

4. Order directing reappraisal filed March 21, 1941.

5. Order of reappraisal and fixing time to redeem farm, filed August 6, 1941.

6. The Condensed Statement in Narrative Form of Testimony Adduced at Hearings on April 24, 1941, May 1, 1941, and May 12, 1941, which accompanies this designation. Note: One complete transcript of the evidence submitted at the hearing on said reappraisement has been filed with the clerk and one complete copy thereof has been delivered to counsel for said appellee.

7. Debtor's Exhibit 1.

8. Petition for Review of Order of August 6, 1941, filed August 13, 1941. (Note: This is attached to Certificate of

Harry F. Wood on Petition for Review. It should not be included twice.)

9. Certificate of Harry F. Wood on Petition for Review, filed September 25, 1941.

10. Letter of Elmer McClain to Clerk, District Court, dated November 10, 1941, and filed November 11, 1941.

11. Letter of Clerk, District Court, to Elmer McClain, dated November 12, 1941, and filed November 12, 1941, replying to letter of Elmer McClain dated November 10, 1941, and advising as to admission of Harry F. Wood to Bar of District Court.

12. Memorandum of Opinion on Review, filed November 7, 1941.

13. Order on Petition for Review filed November 17, 1941.

14. Application for Rehearing filed December 8, 1941.

15. Order denying application for rehearing, filed December 9, 1941.

16. Notice of Appeal, filed December 15, 1941.

17. Omit appeal bond and insert this statement: "Bond for costs on appeal in the sum of $250 filed December 17, 1941.

18. Stipulation of Counsel.

19. Designation of contents of record on appeal.

20. Concise Statements of Points attached to designation.

21. Certificate of Clerk.

Elmer McClain and Leon N. Stone,
Lima, Ohio, Attorneys for Appellant.

The Concise Statement of Points and the Condensed Statement in Narrative Form referred to in the foregoing Designation follows:

In the Matter of
Thad Benson Carter,
Bankrupt. } No. 33696 Bankruptcy

Docket Entries.

12/21/34 Petition for composition or extension of time under Section 75, Chapter VIII of the Bankruptcy Act and Schedules filed in triplicate at 11:30 A. M.

" Order approving petition as properly filed under Section 75 filed & ent., Jones, J.

" Order referring petition to Harry Wood, Conciliation Commissioner, filed & ent., Jones, J. True copy of order of reference with copy of petition and schedules to Conciliation Commissioner.

1/23/35 Amendment to Schedule A-3 by leave of Commissioner filed.

5/13/35 Certificate of Commissioner of failure of Debtor to obtain acceptance filed.

5/14/35 Amended petition under Subsec. (s) of Sec. 75 and schedules filed in triplicate at 2:25 P.M.

" Order of adjudication and reference filed & ent. (Jones, J.)

" True copy of order with copy amended petition and schedules to Referee.

" True copy of order to Conciliation Commissioner.

5/22/35 Record of Conciliation Commissioner filed. To Referee.

6/6/35 Order dismissing petition under Sec. 75 (s) filed & ent., (Jones, J.) Copy of order to counsel for Debtor. Copy of order to Referee.

7/2/35 Record of Referee and other papers filed.

" Report for Statistics filed.

1/8/36 Petition of Bankrupt to reinstate case filed.

" Order vacating entry of dismissal and reinstating case and referring case to Harry F. Wood, acting as Referee, filed & ent. (Jones, J.) True copy of order with Referee's and Commissioner's papers to Harry F. Wood.

4/30/36 Amendment to schedule A-3 by leave of Referee filed.

8/7/36 Petition of Union Joint Stock Land Bank to Review order of Commissioner filed.

" Certificate of Commissioner on Review filed. Counsel notified.

9/10/36 Order sustaining petition for Review and dismissing Debtors petition (Jones, J.) Counsel and Referee notified.

10/9/36 Motion of Debtor for re-hearing on Review filed.

10/9/36 Order dismissing proceedings of Debtor so far as it pertains to 112 acre farm, etc. filed (Jones, J.) True copy to Referee.

10/10/36 Petition of Debtor for appeal filed.

10/10/36 Assignments of error filed.

10/10/36 Order allowing appeal and fixing bond in the amt. of $250.00 filed. (Jones, J.)

10/10/36 Citation issued. Ret. 11/9/36.

10/15/36 Bond on appeal approved & filed (Jones, J.) (New Amsterdam Casualty Co.)

11/2/36 Citation ret. & filed. Service acknowledged.

11/7/36 Praecipe for transcript filed.

11/7/36 Motion for extension of time to file transcript in U.S.C.C.A. filed.

" Order extending time for filing transcript of record in U.S.C.C.A. to 12/9/36 filed (J).

12/8/36 Application for extension of time for filing transcript in U.S.C.C.A. filed.

" Order extending time for filing transcript in U.S.C.C.A. to 12/20/36 filed (Jones, J.)

12/18/36 Order extending time for filing transcript in U.S.C.C.A. to 12/27/36 filed (J.)

12/19/36 Certified transcript of record mailed U.S.C.C.A.

Folios 74— 4.20

Certificate .50

4/2/37 Recommendation of Commissioner and order dismissing petition as to The City Loan & Guaranty Co. filed. (J.) Commissioner and counsel notified.

4/14/37 Cert. copy of order of U.S.C.C.A. dismissing appeal filed.

4/16/37 Motion of Debtor for temporary restraining and for order vacating rulings of court of 9/10/36 and 4/2/37 and brief filed.

4/16/37 Temporary restraining order on Common Pleas Court of Summit County filed. True copy of order to atty for Debtor for delivery to Common Pleas Court. True copy of order to Commissioner.

4/29/37 Proof of service of motion filed.

4/30/37 Reply to Motion filed.

5/18/37 Stipulation & order granting leave to file brief filed. (W.)

5/18/37 Brief of City Loan & Guaranty Co. in opposition to motion to vacate filed.

9/22/37 Order vacating restraining order and overruling motion of Debtor to vacate rulings of Court of 9-10-36 and 4-2-37 filed, J.

8/7/40 Petition for Review with motion to dismiss filed.
" Order referring petition for review, etc., to Harry F. Wood, filed. Jones, J.
8/7/40 Copy of petition for review, etc. with true copy of order of reference to Harry F. Wood.
11/29/40 Report of Conciliation Commissioner on petition for review filed. Counsel notified.
" Transcript of testimony before Commissioner filed.
12/9/40 Objections & exceptions to recommendations of Commissioner filed. Copy direct 12/9/40.
1/8/41 Motion of Debtor to amend objections to report of Commissioner & brief filed. Copy mailed 1/8/41.
3/21/41 Order referring Review and objections to Report of Commissioner to Commissioner and directing him to have a re-appraisement made, filed. (Jones, J.) Copies to counsel—true copy to Commissioner.
8/6/41 Order of Conciliation Commissioner fixing time to redeem farm, with transcript of hearing and briefs, filed.
8/13/41 Application of Debtor for extension to file petition for Review, filed. To Commissioner.
8/15/41 Application of Debtor for extension of time to file brief in support of Review, filed. To Commissioner.
9/25/41 Certificate of Commissioner on Review, filed. Counsel notified.
10/1/41 Application for extension of time to file brief on Review allowed. (Wilkin, J.) Counsel notified.
10/11/41 Brief on behalf of Debtor filed. Copies direct.
10/15/41 Reply brief on behalf of secured creditors, filed. Copies direct.
10/20/41 Reply brief of Debtor, filed. Copies direct.

11/7/41 Memo. of opinion on Review, filed. (Jones, J.) Copies to counsel & Commissioner.

11/17/41 Order determining fair value of property and fixing Dec. 15, 1941 in which to redeem said property, filed. Copies to counsel and Referee.

12/8/41 Motion of Debtor for re-hearing on order of Review and affidavits in support, filed. Copies direct.

12/9/41 Application of Debtor for re-hearing, denied. (Jones, J.) Counsel & Commissioner notified.

12/15/41 Notice of appeal of Debtor, filed. Copies mailed to T. W. Kimber and Dwite H. Schaeffer 12/15/41.

12/17/41 Bond on appeal filed. (Joseph A. Burns & Lena D. Carter.)

1/9/42 Designation of contents of record on appeal and statement on which appellant intends to rely, filed.

1/9/42 Condensed statement in narrative form of testimony, filed.

1/9/42 Stipulation re certification of record, filed.

Order.

(Filed March 21, 1941)

The Court having before it for consideration the petition for review and motion of the Debtor for leave to file an amendment to objections and exceptions to the report of the Conciliation Commissioner finds that the decision of the Supreme Court in the case of Wright *v.* Union Central Life Insurance Company should be followed.

It Is Therefore Ordered that this matter be referred to the conciliation Commissioner who is directed to have a re-appraisement of the farm made and that the secured creditor be afforded an opportunity to present evidence as to the present fair value of such farm and that the Conciliation Commissioner determine the correct appraised

value and fix a reasonable time within which the Debtor shall redeem the farm from the mortgage lien, failing in which a public sale is ordered.

(sgd) Jones
United States District Judge

March 21, 1941

Re-Appraisal
Time Fixed to Redeem.

(Filed August 6, 1941)

To the Honorable Paul Jones, Frank Kloeb, and Robert N. Wilkin, Judges of Said District Court.

I Harry Wood, Conciliation Commissioner to whom the above matter was referred to do hereby submit the following:

I conducted several hearings in which the Debtor Thad Benson Carter was present and was represented with counsel. Their witnesses were examined and cross-examined by Mr. Kimber, of Akron, attorney for the secured creditors.

The secured creditors were represented by Mr. Kimber who was present at the several hearings, and had the same number of witnesses as the defendant. These witnesses were examined and cross-examined by Mr. McClain attorney for the debtor.

After hearing the testimony given by the several witnesses, and studying the briefs furnished by the defendant and the plaintiff, and upon a personal investigation by the Conciliation Commissioner of the value of said farm, I hereby fix the value of said farm at $150.00 per acre.

It Is Hereby Ordered that the debtor Thad Benson Carter be given until October 15, 1941 to redeem the farm from the mortgage lien.

It Is Hereby Ordered that the debtor Thad Benson Carter shall not do any planting of any description until after October 15, 1941.

Respectfully submitted,
Harry F. Wood,
Conciliation Commissioner.

Condensed Statement in Narrative Form of Testimony Adduced at Hearings on April 24, 1941, May 1, 1941 and May 12, 1941

(Filed January 9, 1942)

Direct Examination by Creditor

WALTER H. CHAMBERLAIN

Until September 1940 lived on a farm in Summit County, then moved to Macedonia, Summit County, Ohio. Is 59 years of age, and has been a farmer all his life. Still owns the farm but has his son operate it. Lives about a mile and a half from the Carter farm. Has been acquainted with Carter and his farm almost all of his life.

Was a director in the Northfield Bank in Macedonia from the time it was organized about 26 years ago up until a year ago. Has been a director of the Twinsburg Bank for thirty years, and still is. Acted as an appraiser for the Twinsburg Bank since connected with same. Was on the Appraising and Finance Committee of the Northfield Bank for an unstated time. The two banks are community banks serving the people living in the surrounding territory.

Carter's farm is bounded on the east by a slag road running north and south, formerly called the Town Line Road, and now called the Sheppard Road; on the north by the Ledge Road, which is a water bound asphalt road, hav-

ing slightly over a half mile frontage on each of these roads. It is approximately half way between Cleveland and Akron, being about 18 miles from each city. It has a timber tract. The present fair value is about $200 per acre.

On cross examination witness stated that he was a member of the council for the village of Macedonia when it rented a room in a building partly owned by him, and there was some objection thereto, but denied knowing that Carter was one of the objectors.

D. A. SCANLON

Resides in Akron, Ohio, having lived in and about Akron and Summit County for about 37 years. Is 67 years of age. Off and on for the past 8 years has been an appraiser for the Probate Court of Summit County, not appraising regularly for them, but just certain properties. Is now one of the official appraisers for the Sheriff of Summit County. Has acted as appraiser for the sheriff for the past four years and also for about one year about 8 years ago.

Has been president of the North Hill Savings & Loan Company located in Akron for the past ten years and is also a director at the present. Once a year goes out on the appraisal of all the properties secured by loans at the loan company for the purpose of making a report to the state. Has done this for the past five years.

In connection with Probate Court and Sheriff's office has appraised quite a few farms throughout the county. Has appraised farm lands in Macedonia and Northfield Townships in the past year. At request of attorney for the mortgagee creditor went on Carter's farm. It has a frontage on the east of about a half mile, and about a half mile on the Ledge Road. The present fair value is around $200 an acre.

On cross examination stated that he has never farmed, nor owned a farm, but about 67 years ago he lived on a small farm of about 50 acres in the State of Maine.

RUSSELL OSBORNE

Has lived in and about Macedonia since 1909. Is 49 years of age. Has resided for 23 years on his own farm, which is about a mile and a half south of Macedonia, on R. 631 and about 2½ miles south of Carter's farm. Has known Carter's farm for about 30 years. Carter's farm is bounded on the east by the Sheppard Road and on the north by the Ledge Road, being fairly level with said roads; and is approximately half way between Cleveland and Akron, being about 18 miles from each. The Ledge Road is just a cross road from the Sheppard Road which runs into Routes 14 and 82, which are main highways. Carter's farm is about a mile from Route 82 and about 2 miles from Route 14. The present fair value is from $190 to $200 per acre.

Direct Examination by Debtor.

JOHN T. HOWARD

Resides in Cleveland, Ohio. Is City Planner, being connected with Regional Association of Cleveland. Is a graduate of Yale University and the Massachusetts Institute of Technology; was on the staff of the New England Planning Commission, and was on travels throughout the various regions of that field; was in the American Institute of Planners; has lectured to various educational institutions; is now devoting his time exclusively to the study of the land use and the planning of the living quarters buildings and housing and tracts of land in the general vicinity of Cuyahoga County.

In his present professional capacity has had charge of some of the work and studies of the land out in the Metropolitan District of Cleveland, Ohio. This study took about

one and one-half years, with some thirty or forty individuals being engaged in making a survey of the land in that region. Is the author of Publication No. 91 of the Regional Association of Cleveland, dated November 19, 1940, which contains the results of this survey, which from personal study and observation he knows to be correct.

The survey found that from sixty to sixty-five per cent of the land in Cuyahoga County is farms, woods, or is entirely vacant and not used for urban or city purposes. Even in the City of Cleveland itself, the proportion of unused land is twenty-five per cent. There are approximately 28,000 acres of vacant sub-divided land in Cuyahoga County, which if built up in residences would accompodate about a half million people. There is in addition over 40,000 acres of vacant unsubdivided land and over 80,000 acres of farm land in Cuyahoga County, all available for residential purposes. Bedford Township, Cuyahoga County, has a much larger proportion of vacant land than other parts of the county. In 1939 there were 160,000 lots with delinquent taxes in Cuyahoga County. Carter's farm is outside of the Metropolitan area of Cleveland and outside of Cuyahoga County, being just over the county line.

According to the census the population of Cuyahoga County in 1940 was 1,246,000. During the past ten years the population has increased approximately 15,000 people. He has made a study of the population trends of the Cleveland community, and says that the future trend is for an increase of more than one and five-tenths per cent, but the growth will not be as high as in previous decades. This opinion is based on a study of the birth and death rate and the immigration trends not only in the greater Cleveland area but also in other parts of the state, and throughout the entire country. In the past decade, immigration has been less than in previous years.

On cross examination stated that he is 30 years of age and has never lived on a farm or in Summit County.

GEORGE ADAMS.

Has resided in Twinsburg and vicinity entire life. Is 67 years of age. Owns 404 acres and a half interest in 118 acres, said land being in the northeast section. Carter's farm is northwest of Twinsburg. Has been on Carter's farm to get peaches in the front, and has looked over the rest of the farm since then. Is familiar with the buildings. Has never been in the house, except the cellar. The outside condition is run down some. It is not painted. There is a building which is used as a barn which might be O. K. for cattle, but not for storing crops. The fences are just ordinary.

Has had land to sell, which is similar to Carter's land. Has had the price on it at between $40 and $50 per acre, and although has had people inquiring about it, has been unable to sell it because the buildings are not modern. The value of Carter's farm is about $50 per acre.

Cross Examination.

He now lives in Twinsburg proper, having lived there for seven years, but has continued to operate his farm just the same most of the time. His farm is on the Liberty Road, one mile east and one mile north of Twinsburg. Has owned it for over 40 years.

There have been some spring runs on the back end of the Carter farm. Heard many years ago that it is one of the highest points in Summit County. There is a nice orchard which has borne a few pretty good crops.

The Jones farm is near the village of Macedonia and about a mile and a half from Carter's farm. Does not know what it sold for, but supposes that Jooks had something to do with the sale price. Knows where the Eugene Peck farm is, but does not know that it was sold. Knows where

Allen Farm of about 230 acres is, it being about a mile and one half from Twinsburg in the opposite direction from his own farm, but does not know what it is being offered for sale for. Does not know of a recent sale of the Walter Beney Farm, nor where the Oviatt land is; nor the price of it. In the last 2 or 3 years, the Stony Ridge Farm owned by George Bowman, which farm is in the vicinity of Macedonia and Twinsburg, and has about 150 acres was sold for $12,000. The buildings on this farm sold it.

Redirect Examination.

The Bowman farm was sold to Plechaty who had lived there 10 years. When asked as to the character of the buildings on the Bowman farm he said "God! They have a fancy barn there. You see gables in the construction of the barn and the house." The buildings alone would have brought the price of $12,000 for which the land and buildings were sold. The land was free. The Carter farm is in one block. The Bowman farm has a highway, ledges and railroad running through it. The road which runs past the Carter farm is macadam. The Bowman farm is right on an up-to-date brick pavement where it is handy. This Bowman farm has a dairy barn which will hold around 50 head of cattle, besides horses and has spring water running right at the barn. The only spring water on Carter's farm is clear at the back of the farm. The Jones farm is on Route 82 a concrete highway.

ALVA EAGLE

Lives on a farm near Wooster, Ohio. Is a farmer owning 2 farms, operating one entirely by himself, and the other on a 50-50 share basis. Is Vice Chairman in charge of county affairs for the government under the Agricultural Adjustment Act (commonly known as Triple A), having been with them for almost 4 years, or several years previous to becoming associated with the AAA, was manager of

a farm cooperative. Since his association with the AAA he has done a good deal of appraising of farm lands throughout the state of Ohio, including Northern Ohio, Northeastern Ohio, Cuyahoga and Summit Counties, and in the general vicinity of the Carter farm. At the request of Carter he examined Carter's farm this morning for the first time, looking around the buildings a little, going over the farm through the woods and up through the open pasture, by the north fields across and in the peach orchard, going through every field. Took samples of the soil and examined it. This is a part of his regular duties in appraising farms, having made himself familiar with the nature of farm soils and their relation to the value of the farm. He liked the soil very much in the first field right below the buildings, it being a loose light brown top soil, and a yellow brown subsoil, which together are called a chestnut loam. Then he went up through the timber and came around to the north side of the farm and he was very much disappointed in the soil there, finding a light top soil with a very heavy subsoil, or a mottled gray soil. This does not make a very efficient soil for top. The west end of the farm is stony and underlaid with rock. The fences are the old type rail fence, fairly good. There is about 4 acres of peach orchard, some of which is frozen out and not any too thrifty, and some of the trees are dead. Estimates about a third of the trees are no longer efficient. The house is in fair condition, but the rest of the buildings have no value. The outside of the house needs painting badly, and the shingles on the roof have curled up and will soon break and be gone.

He determined the value of the farm as follows: 22 acres at $50 per acre; 10 acres at $35 per acre, this 10 acres lying in the northeast corner of the farm; 10 acres on the north side along the road at $40 per acre; 17 acres which is wheat field in the rear of the farm at $40 per acre; the 4 acre peach orchard at $60 per acre; the 20 acres of open pasture at $35 per acre; and the balance of 85 acres at $25 per acre.

Cross Examination.

The farm on which he resides is 10 miles west of Wooster; the nearest village is Funk, a mile north of his farm. Has lived on his farm of 88 acres since he purchased it in 1913.

Carter went over part of the farm with him while he was examining it today. Saw where the trough for water came out and it looked as if there was a spring there, but there was very little water.

Has never lived in northern Summit County, Macedonia or Twinsburg. In 1935 appraised the Bowman farm and Quayle farm, both of which are near Macedonia and Twinsburg. This appraisal was made when he was working for the Federal Land Bank, and an application had been made by the owners of these farms for loans. Does not know the asked prices for farms in Macedonia and Twinsburg Townships nor is he acquainted with sales that have been made in the last two or three years in this vicinity. Does not personally know that Carter's farm is about 18 miles from Cleveland, nor that a number of farms north of Carter's farm and in that vicinity have been purchased by Cleveland people. From what people have told him, knows that the prices of lands in the vicinity of the Carter farm were much higher ten or fifteen years ago.

JOSEPH A. HUBER

Is in the real estate business at 1306 Center Road, Cleveland Heights, Ohio, which is approximately 14 miles from Carter's farm. Has been dealing in farms for a little over thirty years. Has sold or had for sale farms in the community in which the Carter farm is located, and all around that community, having sold hundreds of farms since he has been in business. At Carter's request he personally examined his farm which is about 18 or 19 miles from the center of Cleveland and just a little farther from the center of Akron. It is not on a main road but on a secondary

road. It has a loose gravel road in front of it, which throws up a lot of dust when driven on. The fences are fair, the buildings are almost worthless, the farm buildings in their present condition not being adequate for farming. Went over the farm going as far as was necessary to see the line, the general type of land, and the different sections of the farm. It is slightly rolling, with what he judged and verified by Carter to be 55 acres under cultivation, approximately 40 acres of mixed timber, about 5 acres of orchard of which from 25 per cent to one-third is dead, about 68 acres of pasture, part of which is very good, and a great deal of it very poor, having briars and brush on it. It has a fairly good location, but its scenic view is "blank". The woods are not very much in view, and the buildings are very poor. The value of Carter's farm is a little under $72 per acre, or about $12,040 for the total. In determining the value, did not consider it merely as a farm, but gave it some credit for being close to town, and for some other business than just ordinary farming. Valued the tillable land of 55 acres at $100; figured there was about $1200 or $1500 at the most for the timber. However, if the timber was cut off, the land would not be worth very much. Figured the timber land at $50 per acre; the 5 acre peach orchard which is good for a few years if taken care of at $200 per acre; the 68 acres of pasture land which with the exception of one field has very little possibility of ever being reclaimed because of the flat surface and being rocky at $30 per acre, the house at $1200 and the barn at $300. The balance of the outbuildings are valueless.

Has knowledge of the prices for which farms in the vicinity of Carter's farm have sold. These prices have varied with the localities, the kind of buildings, the type of soil, the amount of tillable ground. Has sold a number of farms out through Peninsula and Twinsburg, and has had contact with the sale of a great many more. Within the last five years has sold half a dozen or more farms around

Northfield and Peninsula. One farm was sold to Mr. Wigmore of The Otis Steel Company. This was in Oak Hill in Peninsula, having 100 acres, and poor buildings, and it brought $6000. A farm right next to this one, known as the Old Stein Farm, having 144 acres was sold to Mr. Robinson for $9500. Three hundred acres in Kendall Park was sold for $40 per acre with fairly good farm buildings, it being real high scenic property. In the vicinity of Twinsburg and Macedonia, right back of Crown Hill Cemetery 12 acres with fine buildings and not really being a farm, was sold for $8500.

Had the Bowman farm for sale after the Cleveland Trust took it away from Bowman. It had about 98 acres and he sold it to Plechaty for $12,000. It had excellent buildings, the barn "being one that nobody would want to build". The house has three baths, vapor heat, and is in very good condition. It also had spring water running by gravity right into the barn and house, and in the orchard on out to the creek.

Sold the Wise farm for $6500 after showing it 20 times. This farm was just opposite the back end of Carter's farm and joining Carter's farm on the west. It had a great big brick barn, and a 5 room house which was in a livable condition. The Walter Beany farm sold for scenic value. The reason that the farms which he mentioned are not selling at a value higher than the value he put on Carter's farm is their location and not having good buildings.

Cross Examination.

Sometime ago he had some conferences and correspondence with Mr. Kimber, the attorney for the mortgagee creditor relative to Carter's farm, but after getting Mr. Kimber's price on it, he did nothing further. Believes at that time Carter was appraising his farm at $250 per acre. In correspondence between himself and Mr. Kimber's firm, it was stated that Carter had formerly ap-

praised the farm at $400 per acre. This valuation was made in "the good old days", probably before 1930. Looked over the Carter farm when corresponding with Mr. Kimber's firm relative to sale of it. Does not remember the valuation put on it at that time. Knows the general location of the Jones farm, but knows nothing about it. Knows the Walter Beany farm which is some distance south of the Carter farm. It has an old fashioned white house and an old barn.

The value of the standing timber on the Carter farm is about $1500. It is not very heavy and is second growth, being white oak, some red oak, some maple and beach, and some scattering of walnut, which will average second growth.

The farm does and does not have potential value for acreage tracts or small tracts on these 2 highways. In valuing the farm took into consideration the possibility of acreage tracts or small tracts for building purposes. The sad thing about Twinsburg is that it is ruined by "Shanty Town". Small tracts can be sold, but not for any value. The tracts of land some little distance north of Carter's farm on the highway leading from Cleveland have been sold in small tracts, but these are what he referred to as "Shanty Town". Calls it "Shanty Town" because there are no restrictions there, and no rhyme or rhythm of lay-out. This failing could be cured to some extent if the Carter's farm was being sold in small tracts, but "that black eye Twinsburg" still could not be cured: There are negroes living in Twinsburg, which decreases the value thereof, and is one of the black eyes. Some of the colored people settlements in the vicinity of Carter's farm are as follows: (1) Near Bedford on Route 14; (2) Between Lang Road by the cemetery, and the next road north, it is nearly all colored for about a mile. Both of these settlements are about 4 or 5 miles from Carter's farm.

The sale and purchase of farms has been inactive, but there has been some improvement in the desire for farms.

LEONARD PLECHARTY

Is a farmer, having been one for 14 years. Before he left the city he was connected with the Cleveland Home Investment Company and dealt in farm and city real estate in Cuyahoga County, Summit County, and others. Has had experience in dealing in farms in the vicinity of the Carter farm. Was in the market for a farm last fall, and made inquiries about farms and the prices asked. Has lived on the Bowman farm for over 8 years, Mr. Bowman being in the glass-ware and china business in Cleveland. Last fall looked at the Blackburn farm on route 303, having 140 acres. The owner first wanted $6700 but then offered it for $6000. It had two houses and a good barn, and very good land. Also looked at the Van Sweringen farm on Liberty Street. It had approximately 240 acres and a barn and house in fair condition; the land being in fair enough condition to farm, but it was not the best. The owners first wanted $9,000, but were willing to accept $8,000. Also looked at another farm on Liberty Street with 106 acres of ideal land which lay nice, but with no buildings. This belonged to Bert Decker and Adams, and they asked $4200 for it. After looking at all these other places he purchased the Bowman farm. The Carter farm is on a loose gravel road, the buildings are not in too good condition; the house is a nice respectable place, the other buildings are not adequate for farming and he could not farm with the buildings that are there. The value of the Carter farm for farming is $6500 and for other purposes might be $8500. There is other acreage for sale in the vicinity of the Carter farm.

Cross Examination.

The Van Sweringen farm is in back of witnesses farm [the Bowman farm] and four or five miles from the Carter farm.

Did not talk with Mr. Carter about the value he was going to place on the Carter farm. Did not go over the Carter farm but has been there on several occasions. Never went over the timber tract. The Ledge Road on which it fronts has small and large ruts in it. The Sheppard Road is not an improved road in his opinion, being very difficult to travel on last winter.

GILBERT L. HUDDILSTON

Direct Examination by Creditor.

Is 48 years of age. Was born, raised, and still lives in Northfield, Ohio, which is about 2½ miles from Macedonia. Has been a farmer and stock buyer and dealer. Owns a 82 acre farm in Northfield, which he operates; a one-third interest in another farm of 96 acres, and a one-third interest in a piece of property in Solon. Two of these properties are in Summit County. Three years ago he sold for $14,000 the old home place of 33.83 acres in Sagamore Hills, which was originally a part of Northfield Township. Would like to sell his present farm of 82 acres, having a house and small barn for $200 per acre. It is very productive land lying between Brandywine Road and Route 8, which is one of the main thoroughfares from Cleveland to Akron. Knows the location of the Jones farm, that it was recently sold, and that the present owner is conducting a dairy farm.

Knows that some farms in and about Macedonia and Northfield have changed hands once in a while, but does not know what the asking price or selling price has been.

Has known the Carter farm since he was a child and at different times he has been on and over the farm. It is between Cleveland and Akron, being about 16 or 18 miles from each city. Up until 2 or 3 years ago it was used as a dairy farm, a large number of cattle being kept. The farm has an approximate frontage of ½ mile on the Town Line Road and the Ledge Road, the latter being a macadam type road. These roads are improved highways. There are springs and spring water on the back of the farm and the last time he was there it had quite a lot of timber, there being some beautiful white oak trees there. The crops raised on the Carter farm during the past 12 or 15 years seemed very good. Has seen oats, potatoes, corn, soy beans, wheat crops on the Carter farm. Knows there is a peach orchard there. It has a high elevation. When everything else is killed it is still green there. It should bring $175 per acre, and that is a fair value of it. Would offer $150 per acre himself and expect to make some profit on it. Believes there is sufficient timber to rebuild a barn suitable for dairy purposes. It could be made a substantial dairy farm as well as a farm for raising of crops.

Cross Examination.

The 33 acre farm which he sold for $420 per acre is on Sagamore Hill, which is incorporated. This farm is a place of scenic beauty, and some rich Cleveland people buy homes in Sagamore Hill which has some rich places there. His farm sold for a rich person's home, and not for farming purposes, none of the land in that section selling for farm purposes. After selling it, he leased it from the purchaser for $15 per month, the owner reserving the orchard of approximately 3 acres and the door yard. It is about 1½ miles from Cuyahoga Valley, and has scenic beauty way around it.

The springs on the Carter farm are at the opposite corner of the land, being the farthest point from the house. Has not been on the Carter farm for 5 years.

The 82 acres which he owns is southeast of Bedford, which is about 5 miles from Warrensville Heights; southwest of Glenwillow; east of Sagamore Hills, and the way the crow flies about 3½ miles from the Carter farm.

H. A. COCHRAN

Full name is Harry Adolphus Cochran. Has lived in and around Macedonia and Northfield in Summit County for about 56 years. Has been a farmer all of his life, and now lives on a 89 acre farm in Macedonia, Ohio. Also owns several other farms, to-wit: 47 acres which lie southeast of his home farm; 160 acres a mile south of Macedonia; 30 acres which is a fruit farm with about 500 fruit trees, being on the Hudson Road, about a half-mile south of Macedonia; a farm on the Ledge Road; 140 acres; 36 acres; and one other. Formerly owned a farm in Geneva, and a grape farm in Harpers and several other little tracts. The farm on the Ledge Road is directly across the road from the Carter farm, part of it being directly across from the Carter farm, and part of it northwest of the Carter farm. Purchased it in November 1940. It has a house and double garage, being about 52 acres. The Carter farm abuts about ½ mile on the Town Line and Ledge Roads, the latter formerly being known as the Twinsburg Road and now also called the Richfield Road. Has for many years been acquainted with real estate and farm values in the vicinity of Macedonia and Northfield. In the past few years the following lands in this section have changed hands: 1. The Jones farm—he having sold part of the farm—16 or 18 acres to the father of Clarence Jones. It now has 100 acres, and was recently sold by the Cleveland Trust Company for $16,000. (2) Mr. Huddilston's farm of 12 or 13 acres, being an old sand bank and swamp was sold for $275 per acre. (3) The Ben Myers farm which lies on Route 8 in the Township of Macedonia, having approximately 25 acres was sold at he thinks between four

and five hundred dollars an acre. (4) Part of the Graham farm on Route 8.

Has known the Carter farm for 45 or 50 years, knowing it while Mr. Carter's father was alive and owned it. His eyesight has been failing in the past year but if somebody takes his arm, he can see the light but he cannot walk around. He can walk around his home. Has not had reasonably good eyesight for two years. Has not driven for two years. Before that he had good eyesight.

Was all through the timber on the Carter farm about three years ago looking for calves. Thad Carter once tried to chase him out, threatening him with a shot gun. Mr. Carter at this point interjected with the statement "That is a lie." Mr. Cochran then said "Well, I will take that back." A couple of years when he went through the timber, it was a fine piece of timber, oak, whitewood, cucumber, basswood, walnut, nice bunch of maples, some beach, and quite a lot of second growth, having kind of got thick with second growth. There are springs on the west end of the farm which he guessed had never been known to dry up. They are accessible to cattle, having been there for a number of years. Had the pasture on the west end of the farm about 4 or 5 years ago when everything else went dry, and the water was still running there. Has gone to the springs on the Carter farm, and knows other people have gone there when other places were dry. During the past 10 or 15 years the Carter farm has been farmed, potatoes and corn, wheat, and oats being raised there, along with the peach orchard. All kinds of grain can be raised there. The crops raised by Carter on his farm were just a little bit better than those raised by anyone else. It did not seem to matter whether Carter planted his potatoes late or early, he always had a good crop, and the frost would not kill them. The farm is a beauty spot. Does not think that there is a better laying farm between Akron and Pittsburgh. It is

way up high, and has a wonderful scenic location. As long as he can remember it always had a big dairy on it having from 50 to 75 head of cattle. Does not know whether Carter has been dairiyng very much in the last couple of years. Several years ago Carter also had a nice flock of sheep there, and his father used to have 8 or 10 horses, but Carter uses a tractor. The peaches were of the finest quality, Carter saying there was not a more perfect peach raised in the State of Ohio. Carter had a sample peach at the home-coming in Macedonia, and there was not anything else there to equal it. As to his sight, it is like he tells the women. When he gets them up close so he can kiss them, he can tell who they are. About a year and a half ago the house was in fair condition and livable. A coat of paint and a little spouting on it would not hurt it. The top of one of the barns was blowed down, and the other, a horse barn, fell down. There is sufficient timber on the farm to repair the barns and the house, and put everything in good shape. The amount of timber necessary would hardly be missed, but would make the timber thrive a little better.

Carter sold 4 or 5 acres of sod off of the farm for around $200 per acre about 3 or 4 years ago. The fair and reasonable value of the farm is $225 per acre. If he could buy it at $175 per acre he would make an offer in that amount on a cash basis, with the expectation of making a little profit on it if he got tired farming it.

Cross Examination.

He has been present at all three of the present hearings in this matter. Is not entirely blind. Came to the first and second hearings with Mr. Huddilston who led him around because he did not want to fall over anyone. Holds second mortgage of over $2000 on the Carter farm. Could have found his way around and came up the steps alone.

At this point at the request of counsel for the debtor, the conciliation commissioner stated that the former ap-

praisement of Carter's farm in these proceedings was $5800.

The spring witness mentioned is at the southwest corner of the farm. Does not think that the spring at the northwest corner is on the Carter tract. The flats are on the southeast corner. The springs are clear at the west end of the farm. Thinks the Terminal Tower in Cleveland can be seen from the Carter farm. Has heard that George T. Bishop's place is the highest point in Summit County. Knows that the United States Geodetic Survey shows the Carter farm to be about ¼ mile north of the city limits of West Richfield on Route 82. Did not know that the County Engineer's office officially shows the highest elevation to be at the center of Route 82, and being 1320 feet. Did not know, or if he did, has forgotten that the United States survey shows the elevation of the Carter farm to be 220 feet below the highest elevation of 1320 feet shown by the County Engineer's office.

Does not know of the Pasderski farm, the Harry Gill farm, the Sacha farm, or the Stipek farm.

T. W. KIMBER, ATTORNEY FOR GEORGE A. KUBLER, SECURED MORTGAGE CREDITOR

Mr. Kimber stated for the record that the present indebtedness due to the secured creditor, George A. Kubler, as of July 1, 1941, amounts to $34,702.53.

Amherst
Elyria
Oberlin
Lagrange
Wellington
Spencer
Medina
Lodi
Burbank
W. Salem
Polk
Congress
Creston
Rittman
Seville
Wadsworth
Doylestown
Clinton
Canal Fulton
N. Canton
Smithville
Orrville
Jeromesville
Wooster
Dalton
Massillon
Canton
Apple
Lake Erie
Valley City
Brunswick
Strongsville
Peninsula
Akron
Cuyahoga Falls
Barberton
Norton
Green
Hartville
Louisville
Alliance
Leroy
Sterling
Creston
Ashland
Mansfield
Loudonville
Millersburg
Fredericksburg
Sugarcreek
Dover
New Philadelphia
Uhrichsville
Cleveland
Akron
Canton
Youngstown
Pittsburgh
Columbus
Toledo
Cincinnati
Dayton
Zanesville
Cambridge
Steubenville
Wheeling
Parkersburg
Charleston
Huntington
Ashland
Lexington
Frankfort
Louisville
Evansville
Indianapolis
Terre Haute
Vincennes
Chicago
Gary
Fort Wayne
South Bend
Detroit
Flint
Saginaw
Bay City
Grand Rapids
Kalamazoo
Battle Creek
Lansing
Jackson
Ann Arbor
Toledo
Erie
Buffalo
Rochester
Syracuse
Utica
Albany
Binghamton
Scranton
Wilkes-Barre
Allentown
Bethlehem
Easton
Reading
Harrisburg
Lancaster
York
Gettysburg
Hagerstown
Frederick
Baltimore
Washington
Annapolis
Wilmington
Dover
Philadelphia
Camden
Trenton
Princeton
New Brunswick
Newark
Jersey City
Elizabeth
Paterson
Hackensack
Morristown
Dover
Phillipsburg
Belvidere
Flemington
Somerville
Bridgewater
Perth Amboy
Asbury Park
Long Branch
Freehold
Toms River
Lakewood
Atlantic City
Cape May
Vineland
Millville
Bridgeton
Salem
Woodbury
Camden
Moorestown
Mount Holly
Burlington
Bordentown
Hightstown
Princeton
New Brunswick
Plainfield
Elizabeth
Newark
Jersey City
Hoboken
Weehawken
Union City
West New York
Guttenberg
North Bergen
Secaucus
Kearny
Harrison
East Orange
Orange
Montclair
Bloomfield
Nutley
Clifton
Passaic
Paterson
Wayne
Pompton Lakes
Ringwood
Oakland
Mahwah
Ramsey
Upper Saddle River
Saddle River
Ridgewood
Glen Rock
Hawthorne
Wyckoff
Franklin Lakes
Midland Park
Waldwick
Allendale
Ho-Ho-Kus
Paramus
Fair Lawn
Saddle Brook
Lodi
Rutherford
East Rutherford
Carlstadt
Moonachie
Teterboro
Little Ferry
Ridgefield Park
Bogota
Teaneck
Englewood
Tenafly
Cresskill
Demarest
Closter
Alpine
Harrington Park
Northvale
Norwood
Old Tappan
Montvale
Woodcliff Lake
Park Ridge
Hillsdale
River Vale
Westwood
Emerson
Oradell
New Milford
Dumont
Haworth
Cresskill
Demarest
Closter
Alpine
Harrington Park
Northvale
Norwood
Old Tappan
Montvale
Woodcliff Lake
Park Ridge
Hillsdale
River Vale
Westwood
Emerson
Oradell
New Milford
Dumont
Haworth

Petition for Review of Undated Order of Conciliation Commissioner Harry F. Wood, Received by the Farmer Debtor on August 8, 1941

(Filed August 13, 1941)

To the Honorable Harry F. Wood, conciliation commissioner in the matter of Thad Benson Carter, Farmer Debtor Bankrupt, in the United States District Court, Northern District of Ohio, Eastern Division:

The petitioner, Thad Benson Carter, the farmer debtor herein, was a party to the following farmer debtor proceeding pending before Honorable Harry F. Wood, as as conciliation commissioner, namely:

The petition to the judges of said court of the said farmer debtor for a reappraisal of his property pursuant to Section 75 (s) (3) of the Bankruptcy Act, Title 11, Section 203 (s) (3), U.S.C., having been granted by the issuance of an order of said court entered March 21, 1941, directing said conciliation commissioner to have a reappraisement made of said property, said conciliation commissioner thereupon made and issued the following order which is herein complained of, on a date not named by said conciliation commissioner but which order was received by said farmer debtor on August 8, 1941, no notice of the issuance of said order having theretofore been given to or received by said farmer debtor or by his counsel:

Said order reads as follows:

"Re-Appraisal

Time Fixed To Redeem Farm

To the Honorable Paul Jones, Frank Kloeb, and Robert Wilkin, Judges of Said District Court.

I Harry Wood, Conciliation Commissioner to whom the above matter was referred to do hereby submit the following:

I conducted several hearings in which the Debtor Thad Benson Carter was present and was represented

with counsel. Their witnesses were examined and cross-examined by Mr. Kimber, of Akron, attorney for the secured creditors.

The secured creditors were represented by Mr. Kimber who was present at the several hearings, and had the same number of witnesses as the defendant. These witnesses were examined and cross-examined by Mr. McClain attorney for the debtor.

After hearing the testimony given by the several witnesses, and studying the briefs furnished by the defendant and the plaintiff, and upon a personal investigation by the Conciliation Commissioner, of the value of said farm, I hereby fix the value of said farm at $150.00 per acre.

It Is Hereby Ordered that the debtor Thad Benson Carter be given until October 15, 1941 to redeem the farm from the mortgage lien.

It Is Hereby Ordered that the debtor Thad Benson Carter shall not do any planting of any description until after October 15, 1941.

Respectfully submitted,
Harry F. Wood,
Conciliation Commissioner."

SPECIFICATION OF ERRORS

The petitioner, Thad Benson Carter Farmer Debtor, complains of the following errors in respect of said order:

1.

It is erroneous in fixing the valuation of the said 168 acre farm at $150.00 per acre, a total of $25,200, which is more than four and one-third times the appraisal of the same farm theretofore made and approved by said conciliation commissioner in the same farmer debtor proceeding which is now pending.

2.

The valuation of said farm as so fixed is contrary to the evidence.

3.

The valuation of said farm as so fixed is contrary to the weight of the evidence.

4.

The valuation of said farm as so fixed is contrary to law.

5.

The valuation of said farm as so fixed is erroneous because based upon purported evidence not offered or produced at the hearing, or hearings, conducted before the conciliation commissioner, which purported evidence the said farmer debtor had no opportunity to meet by counter evidence or by cross-examination.

6.

The valuation of said farm as so fixed is void because based upon purported evidence not offered or produced at the hearing, or hearings, conducted before the conciliation commissioner, which purported evidence the said farmer debtor had no opportunity to meet by counter evidence or by cross-examination.

7.

Said valuation is erroneous because made and fixed by the conciliation commissioner upon a personal investigation by the conciliation commissioner made outside of and independent of the hearings conducted for the purpose of fixing said valuation which personal investigation neither the petitioner herein nor his counsel was afforded opportunity to offer counter evidence or to cross-examine concerning the evidence adduced by said personal investigation.

8.

Said valuation is void because made and fixed by the conciliation commissioner upon a personal investigation by the conciliation commissioner made outside of and independent of the hearings conducted for the purpose of fixing said valuation at which personal investigation neither the petitioner herein nor his counsel was afforded opportunity to offer counter evidence or to cross examine concerning the evidence adduced by said personal investigation.

9.

Said order is erroneous in not fixing sufficient time within which the said farmer debtor, the petitioner herein, may redeem said farm from the mortgage lien against it.

10.

Said order is void in not fixing sufficient time within which the said farmer debtor, the petitioner herein, may redeem said farm from the mortgage lien against it.

11.

Said order is erroneous in ordering that the farmer debtor, the petitioner herein, shall not do any planting of any description until after October 15, 1941, on his said farm.

12.

Said order is void in ordering that the farmer debtor, the petitioner herein, shall not do any planting of any description until after October 15, 1941, on his said farm.

TRANSCRIPT OF EVIDENCE

The said proceeding conducted before the said conciliation commissioner at said hearings before the conciliation commissioner, together with the evidence offered thereat has been fully reported and transcribed by the reporter selected by agreement of the parties and confirmed by said conciliation commissioner. The original report and transcript made by said reporter has heretofore been delivered to said conciliation commissioner and a copy thereof has been heretofore delivered to counsel for each party represented at said hearings.

Said conciliation commissioner is requested to transmit said report and transcript with this petition for review together with his certificate on this petition for revew to the clerk of the District Court.

PRAYER

Wherefore the said farmer debtor, the petitioner herein, prays that said order, notice and a copy of which were received by him on August 8, 1941, be reviewed and reversed, and for such order as may be just, and further that he be restored to all things he has lost by reason of said errors.

Thad Benson Carter,
By Elmer McClain, Lima, Ohio
His Attorney of Record

Lima, Ohio
August 11, 1941
(Duly Verified)
(Proof of Service)

CONCILIATION COMMISSIONER'S CERTIFICATE ON REVIEW

(Filed September 25, 1941)

To the Hon. Paul Jones, Frank L. Kloeb and Robert N. Wilkin, Judges of the District Court for the Northern district of Ohio:

I, Harry F. Wood, the Conciliation Commissioner in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, an order a copy of which is annexed to the Petition for Review, was made and entered on the 13th day of August, 1941.

That on the 13th day of August, 1941, Thad Benson Carter the Farm Debtor herein feeling aggrieved theroat, filed a petition for Review, which was granted.

That, the errors complained of is that your Conciliation Commissioner order was contrary to law and against the weight of evidence.

That a summary of the evidence, questions presented and my conclusion of the facts are set forth in full in my opinion rendered, which has been sent to the clerk.

I hand up, herewith, for the information of the Judges, the following papers:

1—Application for extended time to file petition for Review.

2—Application for extension of time to file a Brief upon the Petition to Review.

3—Petition for review.

all of which are

Respectfully submitted,
Harry E. Wood,
Conciliation Commissioner

West Richfield, Ohio
September 24, 1941

Appearances: T. W. Kimber, attorney for George A. Kubler—503 Flatiron Bldg., Akron, O. Elmer McClain, attorney for Thad Benson Carter—Lima, Ohio.

Letter of Elmer McClain to Clerk, District Court

November 10, 1941

Honorable C. B. Watkins, Clerk
United States District Court
Cleveland, Ohio

Dear Sir:

Re: Harry F. Wood

Will you please inform me whether Harry F. Wood is a member of the Bar of the United States District Court for the Northern District of Ohio.

Yours very truly,
Elmer McClain

EMcC:V

Letter of Clerk, District Court to Elmer McClain

Cleveland, Ohio
November 12, 1941

Mr. Elmer McClain
Attorney at Law
Lima, Ohio

Dear Sir:

We have searched our roster of attorneys qualified to practice before this Court and are unable to find any record of the admission of Harry F. Wood.

Very truly yours,

C. B. Watkins, Clerk
K. V. Wilson
K. V. Wilson, Chief Deputy

KVW:js

Memorandum.

(Filed November 7, 1941)

Jones, J.:

This proceeding is to review a reappraisement made pursuant to an order of the Court entered March 24, 1941. The sole question presented is one of fact based upon the Conciliation Commissioner's determination of the fair and reasonable value of the debtor's farm. The Commissioner, after hearing testimony of persons called by the farmer-debtor and the secured creditor, made a finding that the fair and reasonable value of the farm, upon reappraisement, is $150.00 per acre. His order fixing such value was made sometime in August of 1941 and the debtor was given until October 15, 1941, to redeem. The debtor challenges the correctness of the Commissioner's findings principally on the ground that the fair value as found by the Commissioner is far in excess of the present fair and reasonable market value and of the original appraisement made some years before (perhaps three years). However, that value, the Commissioner stated, was made for taxation purposes.

The farm in question is in Macedonia, Summit County, Ohio, at the corner of Ledge and Sheppard Roads, the former being an improved highway and the latter a town line road. It consists of 168 acres-plus and is approximately 18 miles from Cleveland and a little farther than that from Akron, Ohio. There are a house and a barn on the farm and some 40 acres of timber land. It was stated by one of the witnesses that the buildings are not in very usable condition and that the fences are very ordinary. The values given by the witnesses called for the secured creditor ranged from approximately $29,000.00 to $33,000.00. The values given by the witnesses called for the farmer-debtor were from $6,500.00 to $12,000.00. This is a wide discrepancy, indicating a broad divergence of opinion as to the value of the farm. Thus is presented a difficult situation to those called upon to make a finding of fair and reasonable market value.

After reading the testimony, it does seem to me that the appraisal is high on the basis of today's conditions and market for farm lands located as this one is. True, it is upon a secondary but improved highway and approximately midway between the populous communities of Cleveland and Akron, and it would seem to border on or lie just outside of the so-called Cleveland metropolitan area. The buildings and fences are probably of little value for appraisal purposes and the timber land probably the same.

Giving effect to all elements upon which the evidence rests, I think that the appraisal is somewhat high, but this is not to say or to intimate that either the secured creditor or the Commissioner overreached or attempted to defeat the farmer-debtor in his opportunity or effort for redeeming his farm. A review of the testimony gives the impression that there is not an active market for farm land, in this location at least, although it has improved somewhat

within the last two or three years. While it may be possible that the land has a potential value for development into the country place class, if and when conditions favorable for such development return, yet it is to be seriously doubted that such a market value ever will exist and it must be regarded as merely speculative, as matters stand. There are no present or prospective developments to justify a fair market value upon such basis. Generally, the rule is that the fair market value is the price which a willing seller could reasonably expect to obtain from a desirous buyer, neither being under necessity.

Viewing the whole matter in an effort to approach and fulfill the duty of the Court under the statute, I think the fair and reasonable market value of the farm, under the evidence before me, is $20,000.00, and I so find and conclude. Since the original date for redemption fixed by the Commissioner expired on October 15, 1941 a new date is hereby fixed. The debtor is given until December 15, 1941, to redeem, failing in which the property shall be sold at public sale.

Jones,
U. S. District Judge

November 7, 1941

Journal Entry

(Filed November 17, 1941)

This cause came on for hearing on petition for review filed on behalf of the farmer debtor, Thad Benson Carter, for a review of the order of the conciliation commissioner finding the present fair and reasonable market value of the farm land in question and fixing a date for redemption, and upon the record, evidence, and the arguments of counsel for the parties, and was submitted to the court.

Upon consideration thereof the court finds that the present fair and reasonable market value of the said land is twenty thousand dollars ($20,000).

The court therefore finds, orders, and adjudges that the present fair and reasonable market value of said farm land is twenty thousand dollars ($20,000).

The court, considering further the question as to the period of time within which the farmer debtor may redeem said described land at said valuation, grants said farmer debtor the right to redeem said farm land until December 15, 1941.

It is the further order and judgment of the court that if said farmer debtor shall not redeem said land on or before December 15, 1941, that said farm land shall be sold at public sale according to law.

Jones,
Judge.

Application for Rehearing.

(Filed December 8, 1941)

Now comes the farmer debtor, Thad Benson Carter, and applies to the court for a rehearing of the matter which was the subject of the Journal Entry of this court entered November 17, 1941, reading as follows:

"JOURNAL ENTRY

"This cause came on for hearing on petition for review filed on behalf of the farmer debtor, Thad Benson Carter, for a review of the order of the Conciliation Commissioner, finding the present fair and reasonable market value of the farm land in queston and fixing a date for redemption, and upon the record, evidence, and the arguments of counsel for the parties, and was submitted to the court.

Upon consideration thereof the court finds that the present fair and reasonable market value of the said land is twenty thousand dollars ($20,000).

The court therefore finds, orders, and adjudges that the present fair and reasonable market value of said farm land is twenty thousand dollars ($20,000.00).

The court considering further the question as to the period of time within which the farmer debtor may redeem said described land at said valuation, grants said farmer debtor the right to redeem said farm land until December 15, 1941.

It is the further order and judgment of the court that if said farmer debtor shall not redeem said land on or before December 15, 1941, that said farm land shall be sold at public sale according to law.

Jones;
Judge."

This petition for rehearing is presented for the consideration of the court for the reason that in the court's memorandum on the subject of the order preceding the entry of said order, which memorandum was filed on or about November 7, 1941, it was said in said memorandum concerning the valuation of $5,800 originally placed upon the real estate in question by the conciliation commissioner: "However that value, the commissioner stated, was for taxation purposes."

Thad Benson Carter, the farmer debtor, respectfully represents to the court that the original valuation of $5,800 was, in the opinion of the conciliation commissioner, the fair and reasonable market value of the said real estate when such valuation was made.

In support of this statement the said Thad Benson Carter presents the following affidavits:

AFFIDAVIT

State of Ohio,
Summit County—ss:

A. S. Neale, being duly sworn, says that he was one of the appraisers who was appointed by the conciliation commissioner, Harry F. Wood, in the Matter of Thad Benson Carter, Farmer Debtor, in Proceedings under Section 75

of the Bankruptcy Act, in Case 33696, in the United States District Court, Cleveland, Ohio; that said appraisers appraised the 168 acre farm of the farmer debtor at $5800, which the said appraisers considered to be the then fair and reasonable market value; that said conciliation commissioner, Harry F. Wood, at the time when the appraisal was reported to him by said appraisers said that $5800 was no more than the farm was worth, and he expressed his agreement with the appraisers in fixing the appraisement of said farm at $5800.

Said 168 acre farm is the farm on which the said farmer debtor, Thad Benson Carter, is now residing and farming, and has been farming for the past several years.

A. S. Neale
A. S. Neale

Sworn to before me and in my presence subscribed this 3rd day of December, 1941.

Carl C. Thompson,
Notary Public.

Notary Seal (Stamp) Carl C. Thompson
Notary Public

My Commission expires July 22, 1944

AFFIDAVIT

State of Ohio,
Summit County—ss:

C. E. Jones, being duly sworn, says that he was one of the appraisers who was appointed by the conciliation commissioner, Harry F. Wood, in the Matter of Thad Benson Carter, Farmer Debtor, in proceedings under Section 75 of the Bankruptcy Act, in Case 33696, in the United States District Court, Cleveland, Ohio; that said appraisers appraised the 168 acre farm of the farmer debtor at $5800, which the said appraisers considered to be the then fair and reasonable market value; that said conciliation com-

missioner, Harry F. Wood, at the time when the appraisal was reported to him by said appraisers said that $5800 was no more than the farm was worth, and he expressed his agreement with the appraisers in fixing the appraisement of said farm at $5800.

Said 168 acre farm is the farm on which the said farmer debtor, Thad Benson Carter, is now residing and farming, and has been farming for the past several years.

C. E. Jones
C. E. Jones

Sworn to before me and in my presence subscribed this 4th day of December, 1941.

A. S. Neale
Justice of the Peace, Summit Co., O.

Wherefore the said Thad Benson Carter, farmer debtor herein, prays the court to rehear the said matter; to reverse the order of the said conciliation commissioner which is the subject of his petition for review herein and that he may have such relief as he may be entitled to in equity and justice.

Thad Benson Carter
Thad Benson Carter
Farmer Debtor.

(Duly verified)
(Proof of Service)

Order

(Filed December 9, 1941)

Application for Rehearing.
Ruling: "Upon due consideration, application denied."

Jones,
Dec. 9, 1941. Judge

Notice of Appeal

(Filed December 15, 1941)

Notice is hereby given that Thad Benson Carter, the farmer debtor above named, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit

(1) From the final order and judgment on the petition for review of the order of Harry F. Wood finding that the present fair and reasonable market value of the farmer debtor's farm land is $20,000, and that said farm land shall be sold at public sale according to law if said farmer debtor shall not redeem said land on or before December 15, 1941, entered in this action on November 17, 1941; and

(2) From the final order and judgment entered in this action on December 9, 1941, denying the application of Thad Benson Carter for rehearing of said final order and judgment entered in this action on November 17, 1941.

Elmer McClain and Leon N. Stone
Lima, Ohio
Attorneys for the Appellant,
Thad Benson Carter.

Appeal Bond

Bond for Costs on Appeal in the Sum of $250.00 Filed December 17, 1941.

Stipulation Re Certification of Record

(Filed January 9, 1942)

It is hereby agreed that the record as presented to the clerk may be certified by the clerk as required by law and the rules of the Appellate Court as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause as set forth in the Designa

tion for transcript without further comparison by the clerk.

Elmer McClain and Leon N. Stone
Elmer McClain and Leon N. Stone
Attorneys for Appellant.
T. W. Kimber,
T. W. Kimber,
Attorney for Appellee

Concise Statement of Points on Which Appellant Intends to Rely on Appeal

The District Court erred in its order, judgment and decree of November 17, 1941, in the following respects, namely:

1. In adjudging the present fair and reasonable market value of the farmer debtor's land to be $20,000.

2. In ordering said farmer debtor to redeem said land at $20,000 by December 15, 1941.

3. In ordering said farmer debtor's land to be sold at public sale according to law if said farmer debtor shall not redeem said land by December 15, 1941.

4. In basing said order on a statement of the conciliation commissioner that the original appraisal of said land in these proceedings was for taxation purposes.

5. In affirming the conciliation commissioner's order of reappraisement to the extent of adjudging the present fair and reasonable market value of said farmer debtor's land to be $20,000, said conciliation commissioner's order of reappraisement being made and fixed by the conciliation commissioner upon a personal investigation made outside of and independent of the hearings conducted for the purpose of fixing said valuation, neither the farmer debtor nor his counsel being afforded opportunity to offer counter

evidence or to cross examine concerning said personal investigation.

Elmer McClain, Lima, Ohio
Leon N. Stone, Lima, Ohio
Counsel for Appellant.

(Proof of Service.)

Certificate of Clerk

Northern District of Ohio,
Eastern Division—ss:

I, C. B. Watkins, Clerk of the United States District Court within and for said district hereby certify that the foregoing typewritten pages contain a full, true and complete copy of the pleadings and other papers in this cause in accordance with the Designation for Contents of Record on Appeal filed herein.

There is also inclosed herewith original transcript of testimony in question and answer form, in accordance with request contained in letter of T. W. Kimber, Attorney for Secured Creditor, George Kubler, dated January 10, 1942.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said court at Cleveland, in said district, this 21st day of January, A. D. 1942.

C. B. Watkins, Clerk.
K. V. Wilson,
(Seal) K. V. Wilson, Chief Deputy.

PROCEEDINGS IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED—October 9, 1942.

(Before: Hicks, Simons and Martin, JJ.)

This cause is argued by Elmer McClain for Appellant and by T. W. Kimber for Appellee and is submitted to the Court.

JUDGMENT—Entered October 14, 1942.

This cause was heard upon the transcript of the record, briefs and arguments of counsel, and it appearing that there was no abuse of judicial discretion in the finding that the reasonable market value of the farm land in question was $20,000, and no reversible error appearing:

It Is Ordered and Adjudged that the judgments and orders appealed from be and the same are in all things affirmed.

PETITION FOR REHEARING—filed Nov. 12, 1942

This petition for rehearing is presented in typed form by leave of this Court.

To the United States Circuit Court of Appeals for the Sixth Circuit and to the Honorable Judges Thereof:

The appellant presents his petition for rehearing and in support thereof respectfully shows:

I

No opinion has been handed down by this court; the final order merely affirms the orders appealed from, stating as a preliminary that "there was no abuse of judicial discretion in the finding that the reasonable market value of the farm land in question was $20,000".

"Abuse of judicial discretion" is not involved in this case. Neither is "discretion" involved. To the contrary, the applicable part of Section 75, being also a part of the "orderly procedure" of the "mandate of the statute" as characterized by the Supreme Court in the twelve unanimous decisions of that court, requires that the conciliation commissioner "SHALL . . . fix the value of the property in accordance with the evidence submitted." Section 75 (s) (3).

Where it was argued that a district court had a "discretion" to deny a motion for rehearing, based on the ground that the Supreme Court had spoken, the Eighth Circuit Court of Appeals in *Peterson* v. *John Hancock Mutual Life Insurance Company*, (1940), CCA 8, 116 Fed. (2d) 148, said:

> "It is argued by counsel for the appellee that the order overruling the motion for a rehearing entered on January 15, 1940, is not appealable because it is a discretionary order. In this view counsel are mistaken. The motion for rehearing called for judicial decision, not for judicial discretion. Discretion, which must be a legal discretion, does not extend to a refusal to apply well-settled principles of law to a conceded or indisputable state of facts."

II

Section 75 grants no power to the bankruptcy court to deprive him of his property except by the explicit and strict terms of Section 75 which plainly direct the bankruptcy court how to proceed.

It was the departure from this "orderly procedure" and from the "mandate of the statute" that was the basis of the Supreme Court decisions in

Wright v. *Union Central*, (1938), 304 U. S. 502;
John Hancock v. *Bartels*, (1939), 308 U. S. 180;
Gray v. *Union*, (1939), 308 U. S. 523;
Morrison v. *Federal*, (1939), 308 U. S. 524;
Borchard v. *California*, (1940), 310 U. S. 311;
Wright v. *Union Central*, (1940), 311 U. S. 273;
Benitez v. *Bank*, (1941), 313 U. S. 19; and
Wright v. *Logan*, (1942), 315 U. S. 139.

III

It was the same departure from that "orderly procedure" and "mandate of the statute" that formed the basis of the decisions of this court in:

Hoyd v. *Citizens Bank*, CCA 6, (1937), 89 Fed. (2d) 105;
Shadley v. *Ludwig*, CCA 6, (1939), 106 Fed. (2d) 745;
Miller v. *Hatfield*, CCA 6, (1939), 111 Fed. (2d) 28;
Potter v. *Union Central*, CCA 6, (1940), 111 Fed. (2d) 145;
Ellis v. *Connecticut Mutual*, CCA 6 (1940), 111 Fed. (2d) 896;
Walker v. *Detwiler*, CCA 6, (1940), 111 Fed. (2d) 990;
Schriever v. *Oxford*, CCA 6, (1941), 116 Fed. (2d) 683;
Chapman v. *Federal*, CCA 6, (1941), 117 Fed. (2d) 321.

IV

The order of affirmance as it now stands is a radical departure from the consistent decisions of this court which

have generally followed carefully the terms of the statute and the decisions of the Supreme Court.

V

The highest right of a farmer debtor under Section 75 is the culmination of the Act in providing for his opportunity to redeem his property at its fair and reasonable market value. To increase the farm valuation to nearly FOUR AND A HALF TIMES its fair and reasonable market value is as much a denial of the "mandate of the statute" as if he were in so many words denied any right to redeem under Section 75.

VI

If the denial of his appeal grows out of the maxim that "the law overlooks little things", then the farmer debtor repectfully suggests to the court that the principles involved in his appeal are not "little things."

Although the principles contended for by the appellant are of great importance to him personally, they are of far greater importance to the public. There are more persons and more property engaged and involved in agriculture than in any other industry.

Because there are so many individuals engaged in agriculture, no one of them is a match for mortgage holders. As the Supreme Court suggested in *Wright* v. *Union Central*, 311 U. S. 273, the farmer debtor's rights are not to be "dependent on the outcome of his race of diligence with a creditor". In that case, where there was far more reason for sanctioning the bankruptcy court's order to deprive the farmer debtor of his property than here (for here there is none), the Supreme Court said of the facts in that case "to hold that they empowered the court to deprive the debtor of his express and fundamental statutory right to redeem at the appraised value or at the value fixed by the court would be to imply a power of forfeiture wholly incompatible with the broad design of the Act."

The Supreme Court also said in *Wright* v. *Union Central*, 311 Ill. 273:

> "Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. . . . There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor, and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress . . . lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

And here there is no room for "narrow formalistic interpretations," for the statute is crystal clear.

In naming a fantastic valuation out of all relation of the "fair and reasonable value of the property", the bankruptcy court flagrantly disregarded and violated not only the spirit but the *express letter of the statute*.

VII

If bankruptcy courts in administering the farmer debtor law under Section 75 of the Bankruptcy Act are to be permitted to disregard the plain purpose of the law and the repeated unanimous expositions of their duty by the Supreme Court and by this court, because only a "little thing" is involved in particular instances, the precedents so established will, as Lincoln said, effectually "cheat the law". All of the enactments of the legislative branch and all of the twelve unanimous decisions of the Supreme Court will tumble down in chaos.

It is suggested that the words of the three dissenting Justices of the Supreme Court in *Union Joint Stock Land Bank* v. *Byerly*, 310 U. S. 1, in support of the decision of this Court in *Byerly* v. *Union Joint Stock Land Bank*, CCA 6, (1939), 106 Fed. (2d) 576, are equally adaptable

here to the final order of the bankruptcy court which in practical effect orders the farmer debtor to surrender and deliver his property to the mortgage holder: "We believe that to deny this farmer the benefits of the Act . . . would be largely to defeat the purposes of the Act". And "To decide otherwise than that the dismissal here did not deprive the farmer debtor of the right to proceed . . . is to permit dismissal at the instance of the farmer's creditors and without the farmer's knowledge to prove a ready means of circumventing the Act". So the dissenting opinion in that case opened and closed, and it is earnestly maintained that the same observations are properly applicable to the order in the present instance.

VIII

Should this act of the bankruptcy court below be allowed to stand, the unremitting hostility during the past nine years of the mortgage holders to the "Supreme Law of the Land" as enacted by the Congress and construed by the Supreme Court and by the preceding decisions of this court has been a remunerative rebellion against the nation. The heaps of money spent to defeat the national will have paid huge dividends, including the expenditure of $63,790.63 for legal fees and expenses by an outsider in a single case where the sum so spent was *fifteen times* the value of the farmer debtor's property which was there involved.

Wherefore the appellant, upon the foregoing grounds, respectfully urges that his petition for rehearing be granted and that upon further consideration the final order of the court below be reversed.

ELMER MCCLAIN,
Counsel for the Appellant,
Thad Benson Carter.

Lima, Ohio
November 3, 1942

Certificate of Counsel

I certify that this petition for rehearing is filed in good faith and not for delay.

Elmer McClain,
Counsel for the Appellant,
Thad Benson Carter.

Proof of Service

A copy of the foregoing petition for rehearing has been served upon counsel for the appellee, T. W. Kimber, Esq., 503 Flatiron Building, Akron, Ohio.

Elmer McClain,
Counsel for the Appellant,
Thad Benson Carter.

ORDER DENYING PETITION FOR REHEARING—
Filed December 3, 1942.

The petition to rehear is denied.

Clerk's Certificate

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Thad Benson Carter *vs.* George A. Kubler, No. 9165, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 27th day of January, A. D. 1943.

J. W. Menzies,
Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 5, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, limited to the first question presented by the petition and the case is transferred to the summary docket. Counsel are requested to discuss in their briefs and on the oral argument the question whether the error, if any, was cured by the District Court's review.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7217)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM 1942.

No. 750 18

In the Matter of
THAD BENSON CARTER,
Farmer Debtor.

THAD BENSON CARTER,
Petitioner,

v.

GEORGE A. KUBLER,
Respondent.

PETITION AND BRIEF

FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ELMER MCCLAIN,
Lima, Ohio,
Attorney for Thad Benson Carter,
Petitioner.

T. W. KIMBER,
503 Flatiron Building, Akron, Ohio.
Attorney for George A. Kubler,
Respondent.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1942.

NO.

In the Matter of
THAD BENSON CARTER,
Farmer Debtor.

THAD BENSON CARTER,
Petitioner,

v.

GEORGE A. KUBLER,
Respondent.

PETITION

For a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

The brief in support of this petition begins at page 8.

All emphasis in this petition and brief is supplied except where it is stated otherwise.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

A Summary Statement of the Matter Involved.

The question presented arises out of the redemption provisions of the farmer debtor law, Section 75 of the Bankruptcy Act, 11 U. S. C., Section 203. The applicable part of Section 75 (s) (3) provides that ". . . the debtor may pay into court the amount of the appraisal of the property . . . **Provided,** That upon request . . . the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and **after such hearing, fix the value of the property, in accordance with the evidence submitted,** and the debtor shall then pay the value so arrived at into court . . . and thereupon the court shall, by an order turn over full possession and title of said property . . . to the debtor".

After originally fixing the official valuation at $5800 earlier in the same proceeding under the first paragraph of Section 75 (s), the conciliation commissioner set it at $25,200 for redemption from mortgages of roughly the same amount. The judge upon review reduced it to $20,000.

No opinion was rendered by the appellate court. It merely entered its order, the substance of which reads: "it appearing that there was no abuse of judicial discretion" . . . "the judgments and orders" . . . "are in all things affirmed." This final order appears at R. 45.

II.

Statement of the Basis of the Jurisdiction of This Court.

The jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code; 28 U.S.C. 347 (a).

The petitioner has complied with Section 8 (a) of the Act of February 13, 1925; 28 U. S. C. 350. The final judgment of the court below (R. 45) became final on December 3, 1942, when a petition for rehearing was denied (R. 51). This petition is filed within three months thereafter.

III.

The Questions Submitted.

The questions are:

1.

In fixing the valuation at which a farmer debtor shall redeem his farm does the statutory provision in Section 75 (s) (3) that the court shall "set a date for hearing, and after such hearing, fix the value of the property, **in accordance with the evidence submitted,**" permit a conciliation commissioner to fix such valuation "upon a **personal investigation by the conciliation commissioner**" in addition to the evidence submitted to him at a hearing? R. 9, next to the last paragraph.

2.

May he fix such valuation contrary to the evidence by raising it from his own original official appraisal of $5800

in the same proceeding to a sum four and one-third times that amount, that is, to $25,200? R. 9, next to last paragraph (168 acres at $150 per acre, $25,200).

3.

In fixing such valuation may the conciliation commissioner consider the amount of liens against the farm?

4.

In view of the statutory provision in Section 75 (s)(3) that after a hearing the court shall fix the value "in accordance with the evidence submitted", may the court exercise a "judicial discretion" in fixing the value of the property?

5.

May a conciliation commissioner in an order fixing the value of a farmer debtor's farm under Section 75 (s)(3) fix approximately two months, expiring October 15, as the time for redemption and prohibit the farmer debtor from doing "any planting of any description until after October 15"? R. 9, bottom of page and R. 10, top of page.

6.

May the judge on petition for review of a conciliation commissioner's order fixing farm valuation for redemption under Section 75 (s)(3), excuse the increase of valuation from an original official appraisal of $5800 to $25,200 by the conciliation commissioner upon the ground that $5800 valuation "was made for taxation purposes", contrary to the statement of the conciliation commissioner in the record that "the former appraisement of Carter's farm in these proceedings was $5800", no different statement or evidence appearing in the record?

7.

May a court in fixing $20,000 as the valuation at which a farmer debtor should redeem his farm pursuant to Section 75 (s)(3), limit the time for such redemption to thirty days, and order that if redemption be not accomplished within such time the farm shall be sold?

IV.

Reasons Relied Upon for Allowance of a Writ of Certiorari.

1.

There is involved a question of importance in the interpretation and administration of a federal statute, Section 75 (s)(3) of the Bankruptcy Act, which relates to the method of redemption by a farmer debtor of his farm from secured debts.

2.

The decision of the appellate court in holding that the bankruptcy court had a judicial discretion in fixing the valuation is in direct conflict with the mandatory provision of Section 75 (s)(3) that the court shall "set a date for hearing, and after hearing, fix the value of the property, in accordance with the evidence submitted".

3.

The decision of the appellate court is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Moser* v. *Mortgage Company*, 1941, 123 Fed. (2d) 423. There also the conciliation commissioner fixed the value of the farm for redemption after hearing the evidence and "making a personal visit to the ranch and looking over the property". The appellate court for

the Second Circuit held in that case that the method pursued violated the statutory requirement that the court shall "fix the value of the property in accordance with the evidence submitted".

4.

The said decision of the Second Circuit Court of Appeals also held that the method of valuation followed by the bankruptcy court in the *Moser* case (which was the method followed in this *Carter* case) was in conflict with the decision in *John Hancock* v. *Bartels*, 1939, 308 U. S. 180, where this court held that Section 75 (s) prescribes a definite course of procedure whereby the bankruptcy court shall set a date for hearing and thereafter fix the value of the property in accordance with the evidence which value the debtor shall pay into court to redeem his property.

5.

The decision of the appellate court below is in direct conflict with the decision of the Third Circuit Court of Appeals in *In re Aughenbaugh*, 1942, 125 Fed. (2d) 887, where, in a bankruptcy proceeding, the appellate court held to be invalid an order of a referee predicated upon the contents of papers not introduced at the hearing.

6.

The decision below is in conflict with the decision of this court in *Interstate Commerce Commission* v. *Louisville*, 1913, 227 U. S. 88, where it was held that the order involved was not based on evidence introduced at a hearing and consequently it was invalid. To the same effect were the decisions of this court in *Akron* v. *United States* (New England Division Case), 1923, 261 U. S. 184; *United States* v. *Abilene*, 1924, 265 U. S. 274; and *Crowell* v. *Benson*, 1932, 285 U. S. 22.

7.

In holding that the bankruptcy court had a "judicial discretion" to fix the sum at which a farmer debtor shall redeem his farm under Section 75 (s)(3) the order of the appellate court below is in conflict with the decision of the Eighth Circuit Court of Appeals in *Peterson* v. *John Hancock*, 1940, 116 Fed. (2d) 148, in holding that "The statute, as construed by the Supreme Court in the *Bartels* case, is explicit and mandatory, and the District Court had no discretion to act contrary to its terms", and holding that "judicial decision and not judicial discretion" is what is called for.

Wherefore your petitioner prays that a writ of certiorari issue to the Sixth Circuit Court of Appeals directing it to certify and send to this court a transcript of the record and proceedings thereon to the end that this cause may be determined by this court and for all other relief as may be proper.

Respectfully submitted,

ELMER MCCLAIN, Lima, Ohio,
Counsel for the Petitioner.

Lima, Ohio
February 6, 1943

BRIEF

In Support of the Foregoing Petition for a Writ of Certiorari.

The index precedes the petition for certiorari.

I.

No Report of the Decision Below.

The appellate court handed down no opinion. Its final order appears at R. 45. The Memorandum Opinion of the Judge of the District Court, which is not reported, appears at R. 35.

II.

Grounds on Which the Jurisdiction of This Court Is Invoked.

The statutory basis of the jurisdiction of this court has been stated at pages 3 and 4 of the preceding petition for certiorari.

The grounds relied upon for invoking the jurisdiction of this court have been set forth at pages 5, 6 and 7 of the preceding petition. To recapitulate them, they are: That an important question of the interpretation and administration of a federal state is involved, namely Section 75 (s) (3) which prescribes the procedure whereby a farmer debtor may redeem his farm from liens against it; that the decision of the appellate court below is in direct conflict with said statute; that said decision is in conflict with

the decision of the Second Circuit Court of Appeals in *Moser* v. *Mortgage Company*, 1941, 123 Fed. (2d) 423; that said decision is in conflict with the decision of this court in *John Hancock* v. *Bartels*, 1939, 308 U. S. 180; that it is in conflict with the decision of the Third Circuit Court of Appeals in *In re Aughenbaugh*, 1942, 124 Fed. (2d) 887; with the decisions of this court in *Interstate Commerce Commission* v. *Louisville*, 1931, 227 U. S. 88; *Akron* v. *U. S.* (New England Division case), 1923, 261 U. S. 184; *United States* v. *Abilene*, 1924, 265 U. S. 274; and *Crowell* v. *Benson*, 1932, 285 U. S. 22, and in conflict with the decision of the Eighth Circuit Court of Appeals in *Peterson* v. *John Hancock*, 1940, 116 Fed. (2d) 148, which was based upon the decision of this court in the *Bartels* case.

III.

STATEMENT OF THE CASE.

District Court Orders Conciliation Commissioner to Conduct Valuation Hearing.

Following the decision of this court in the second case of *Wright* v. *Union Central*, 1940, 311 U. S. 273, holding that a farmer debtor's farm may not be sold under Section 75 (s)(3) until he has had an opportunity to redeem it at its appraised value, the bankruptcy court issued its order of March 21, 1941, directing the conciliation commissioner to have a hearing at which "the secured creditor be afforded an opportunity to present evidence as to the present fair value of such farm and that the conciliation commissioner determine the correct appraised value and fix a reasonable time within which the debtor shall redeem the farm from the mortgage lien". R. 8 to 9.

A Hearing Before the Conciliation Commissioner.

A hearing was held by the conciliation commissioner at which evidence was submitted by the secured creditor and by the farmer debtor. A narrative form of the evidence appears at R. 10 to 28. As the effect of this evidence is an important issue in this case, it is fully considered beginning at page 29 of the **Argument.**

Conciliation Commissioner's Report After Hearing.

The conciliation commissioner reported to the court that he conducted a hearing and "after hearing the testimony given by the several witnesses, and studying the briefs furnished by the defendant and the plaintiff, and upon a personal investigation by the conciliation commissioner of the value of said farm I hereby fix the value of said farm at $150 per acre". ($25,200). R. 9.

Petition for Review.

The farmer debtor filed a petition for review (R. 29).

The Judge's Memorandum Opinion.

Upon review the judge issued his memorandum opinion reducing the valuation to $20,000, $119 per acre. R. 35. Referring to the conciliation commissioner's former appraisal of the fair and reasonable market value of the farm at $5800, $34.52 per acre, the opinion stated: "However, that value the commissioner stated was made for taxation purposes." There is **no such statement in the record.**

Final Order of the District Court.

The final order of the district court pursuant to the opinion of the judge fixed the valuation at $20,000, $119 per acre, and set the time for redemption at December 15, 1941. R. 37.

Application for Rehearing.

The farmer debtor filed an application for rehearing in which he set forth the affidavits of two of the three original appraisers, that originally in the same proceeding they had appraised the farm at $5800 which the said appraisers considered to be the then **fair and reasonable market value**; that said conciliation commissioner at the time when the appraisal was reported to him by said appraisers said that "$5800 was no more than the farm was worth and he expressed his agreement with the appraisers in fixing the appraisement of said farm at $5800." R. 39 to 41.

The petition for rehearing was denied. R. 41.

Appeal.

Following denial of the petition for rehearing an appeal was taken. R. 42.

Final Judgment of the Appellate Court.

Without opinion the appellate court affirmed the district court finding "there was no abuse of judicial discretion in the finding that the reasonable market value of the farm land in question was $20,000." R. 45.

IV.

Specification of Errors.

1.

The bankruptcy court based the valuation for redemption upon a personal investigation made by the conciliation commissioner wholly outside of the evidence submitted at a hearing held by the conciliation commissioner to determine such valuation.

2.

The bankruptcy court defeated the farmer debtor's federal statutory right of redemption by fixing a valuation contrary to the evidence submitted at a hearing.

3.

The bankruptcy court fixed a valuation for redemption at a price greatly in excess of the official valuation previously found by the court in the same proceeding, there being no evidence of any such increase in value.

4.

The bankruptcy court considered the amount of liens against a farm in fixing its valuation for the purpose of redemption from such liens as provided in the farmer debtor law.

5.

The appellate court held that a bankruptcy court may exercise a judicial discretion in fixing the value of a farm for redemption under the provisions of such law. The statute prescribes that the valuation shall be set at its fair and reasonable market value as disclosed by the evidence submitted at a hearing held for the purpose of determining such value.

6.

The bankruptcy court fixed a redemption value of $25,200 for farm real estate and limited the farmer debtor to a period of two months after such value was set within which to raise the required sum.

7.

The bankruptcy court prohibited the farmer debtor from operating his farm by ordering him not to do any planting of any description before the date set for redemption, such date being October 15.

8.

The bankruptcy court sustained an excessive valuation of the farmer debtor's farm for redemption by a conciliation commissioner by finding that the conciliation commissioner's former official valuation in the same proceeding was made for taxation purposes whereas there was no evidence to support such statement.

9.

The bankruptcy court limited to thirty days the time within which the farmer debtor should raise the sum of $20,000 set by the court as necessary to redeem his farm as provided by the farmer debtor law and ordered the farm to be sold upon failure to pay such sum within time.

V.

Summary of the Argument.

The questions presented here concern the very heart and center of the farmer debtor law. If the methods employed here are approved the entire purpose of the law is defeated. The redemption provisions of Section 75 are the culmination of the Act.

The statute definitely lays down the method of valuation. This court has repeatedly held that the statute prescribes an orderly procedure which is a mandate to be obeyed. The bankruptcy court violated the statute by preventing redemption through three devices: (1) the device of increasing the valuation up to the neighborhood of the liens and hiding the discrepancy between evidence and conclusion under the guise of "personal investigation"; (2) the device of setting the time for redemption too short for a farm real estate loan to be consummated; and (3) the device of ordering farming operations to stop—a sure way of defeating a loan.

The method employed has been repeatedly condemned by this court and by the other federal courts.

An examination of the evidence demonstrates the unlawful theory upon which the mortgage holders pressed upon the conciliation commissioner an inflated fictitious valuation made to measure up to the mortgage liens.

VI.

ARGUMENT.

This Case Involves the Whole Purpose of the Farmer Debtor Law.

The purpose of the farmer debtor law, like that of the other debtor laws for railroads, corporations and municipalities, is to keep the owner debtor in permanent possession of the mortgaged property. This is to be accomplished by payment to the security owner of the value of his security in place of permitting him to take the security itself. As this court has declared, "There is no constitutional claim of the creditor to more than that." *Wright v. Union Central*, 1940, 311 U. S. 273, 278.

The administrative machinery, adopted by statute and sustained by this court, to accomplish such purpose is comprised in the redemption provisions of these various statutes. In Section 75 these redemption provisions are embodied in Section 75 (s) (3), where it is provided that the farmer debtor may pay into court the value of his mortgaged property. This value is paid to the secured creditor. The mortgaged property is then free from all liens and the farmer debtor receives his discharge.

If this legal machinery is misused the purpose of the statute is defeated and all the antecedent procedure has been in vain. Of the redemption provisions those pertaining to fixing the valuation of the security are their core and center. If a fictitious inflated valuation is set, there can be no redemption and, as Lincoln said, "the law is cheated."

The statutory method set up in Section 75 and the method employed by the bankruptcy court in this case are therefore first presented.

The Mandate of the Statute Governing Valuation and the Method Employed.

The Statute.

"Such appraisers shall appraise all of the property of the debtor . . . at its **then fair and reasonable market value.**" Section 75 (s) first (unnumbered) paragraph: "upon request . . . the court shall cause a reappraisal . . . or in its discretion **set a date for hearing and after such hearing, fix the value** of the property, **in accordance with the evidence submitted.**" Section 75 (s) (3).

The Method Employed.

The concilation commissioner's increase of the farm valuation from his original official appraisal of $5800 to $25,200 (four and one-third times the original appraisal) was not determined by the evidence submitted. It was undoubtedly influenced by the fact that the first mortgage amounted to $34,702 and the second mortgage amounted to $2000 more. R. 26. R. 27, bottom of page.

Neither the concilation commissioner, the judge, nor the appellate court justified the increase on the basis of the evidence submitted at the hearing. The following statements illustrate the point:

The conciliation commissioner said (after stating that he heard the evidence and studied the briefs of the par-

ties): "and **upon a personal investigation** by the conciliation commissioner of the value of said farm, I hereby fix the value of said farm at $150 per acre" (168 acres at $150, $25,200). R. 9, bottom of page.

The judge upon review said (referring to the original $5800 appraisal by the conciliation commissioner in the same proceeding): "However, that value the commissioner stated, was made for taxation purposes." R. 35, bottom of page. This statement is not supported by any evidence. On the contrary the conciliation commissioner stated that "the former appraisement of Carter's farm in these proceedings was $5800". R. 26, bottom of page to top of page 27. No appraisal for taxation is provided or mentioned in Section 75.

The judge also stated: "it does seem to me the appraisal is high." R. 36, middle of page. "The buildings and fences are probably of little value for appraisal purposes and the timber land probably the same." R. 36, middle of page. "The testimony gives the impression that there is not an active market for farm land in this location." R. 36, bottom of page. "It is seriously doubted that such a market value [for a country place] ever will exist and it must be regarded as merely speculative." R. 37, top of page.

The appellate court: "there was no abuse of judicial discretion." R. 45.

Devices to Defeat the Purpose of the Law.

The ultimate purpose and the culmination of all the provisions of the farmer debtor law in Section 75 is the redemption of the farmer debtor's farm at its "fair and

reasonable market value" so that the farmer may be kept on the farm and the mortgage holder may have the value of his security.

This court made the purpose of the law very clear and protected it in *Wright* v. *Union Central*, 1940, 311 U. S. 273:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. . . . Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. . . . There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

In this statement appear the following citations: *Wright* v. *Union Central*, 1938, 304 U. S. 502. *John Hancock* v. *Bartels*, 1939, 308 U. S. 180. *Kalb* v. *Feuerstein*, 1940, 308 U. S. 433. *Borchard* v. *California Bank*, 1940, 310 U. S. 311.

In the neverending contest by which mortgage holders seek to defeat the purpose of the farmer debtor law there were employed in this instance three devices:

FIRST DEVICE

The Price of Redemption.

An Inflated Valuation Prevents Redemption.

The price of redemption in Section 75 is the "amount of the appraisal" (Section 75 (s) (3)) and the standard

of the appraisal is the "fair and reasonable market value" (Section 75 (s), first and unnumbered paragraph), "in accordance with the evidence submitted". Section 75 (s) (3). One device employed in the instant case was to set an appraisal determined by the amount of liens. An attempt was also made to smother out objections that the evidence submitted does not support the valuation fixed by a statement that the evidence submitted was supplemented by the "personal investigation" of the conciliation commissioner. R. 9.

In the same proceeding the appraisal made by the appraisers who were appointed by the conciliation commissioner, and which was approved by him, was $5800. R. 26, bottom of page and R. 27, top of page. Affidavits of appraisers at R. 39 and 40. Three years later, contrary to the evidence submitted, he raised it to $25,200, that is he increased it to a figure four and one-third times the original appraisal. R. 9 ($150 per acre, 168 acres, or $25,200).

This new valuation came about in the following manner. At the end of the three years statutory stay the holder of the first mortgage, the respondent here, filed a motion to terminate the proceeding. About that time this Court in *Wright* v. *Union Central*, 1940, 311 U. S. 273, held that the farmer debtor's statutory right to redeem could not be defeated by a request of the mortgagee for a sale. The District Court then made an order reciting that "the decision of the Supreme Court in the case of *Wright* v. *Union Central Life Insurance Company* should be followed" and directed the conciliation commissioner to determine "the present fair value of such farm" and "determine the correct appraised value and fix a reasonable time" for redemption "failing in which a public sale is ordered." R. 8, order of March 21, 1941. At the hearing the mortgage

holder brought in as witnesses bankers and mortgage holders who invariably gave estimates of value approximating the mortgage liens. The conciliation commissioner then raised the valuation to $25,200, four and one-third times the appraisal of $5800 which he had originally approved.

On the petition for review the judge put it at $20,000, or nearly three and one-half times the original $5800 appraisal. R. 35 to 38. A study of the action of the conciliation commissioner shows beyond any doubt that here a new device was employed to give lip service to the letter of the law but effectually to defeat its purpose by a fictitious valuation. No reasonable mind can conceive such a figure to be the "fair and reasonable market value" especially when no evidence was adduced to show any change in conditions from the time the same conciliation commissioner had fixed it at $5800.

That the conciliation commissioner knew the evidence submitted to him did not support the $25,200 valuation is indicated by his statement that he made a "personal investigation" in addition to the evidence submitted at the hearing.

SECOND DEVICE

The Time for Redemption.

A naked right of redemption is defeated if a reasonable time is not fixed for its consummation.

No farmer debtor can pay his rental and also accumulate sufficient capital in three years of farm operation to redeem his land. Therefore he must negotiate a loan. It is futile to make application for a farm loan before it is known **exactly how much is needed and when.** To do so prematurely may defeat favorable action when the time

is ripe. From application to delivery of funds is usually at least six months, because the title must be abstracted and examined and objections must be met, and finally the title must be approved in addition to completing the money arrangements.

The second device was the conciliation commissioner's order, filed August 6, 1941 (R. 9) effective August 16, which called for redemption by October 15. As no order in a federal court may be effective until after ten days have expired (Rules of Civil Procedure, Rule 62, 28 U. S. C. 874) this order allowed less than sixty days.

The order of the conciliation commissioner was reviewed by the District Court which entered its order of November 17, 1941 (effective November 27) changing the redemption date to December 15, thus giving only eighteen days for redemption. The petition for rehearing was overruled on December 9, leaving but six days. R. 37 and 38. R. 41.

THIRD DEVICE

Prohibition Against Farming.

Prevention of Farm Operations Destroys the Security's Value.

A third device was the conciliation commissioner's order of August 6, 1941, which further prohibited the farmer debtor from "doing any planting of any description until after October 15, 1941". R. 9 and top of page 10. This prohibition is devoid of any power to issue it and therefore a nullity. It is also contrary to the public interest and to natural law, both of which require that agricultural land must be cultivated and planted lest it become a weed pest.

We will now proceed to examine the evidence.

The Evidence on Value.

The Reason for the Valuation Increase to $25,200.

The record of the testimony (R. 10 to 27) shows how the great chasm between $5800 and $25,200 was negotiated. The first, the original, valuation under the first paragraph of Section 75 (s) was conducted free from any suggestion by the mortgage holders and it named the true value of the land. See the statement of the conciliation commissioner at R. 26, bottom of page and top of page 27 and the affidavits of two of the three appraisers at R. 39 to 40. The second valuation under Section 75 (s) (3) was fixed upon the suggestion and testimony of the mortgage holders who considered that the land ought to bring enough to pay the mortgages. This standard is of course unlawful. Nevertheless, the appraisal was increased to four and one-third its original amount.

Some Extrajudicial Evidence.

Apparently recognizing that the evidence submitted to him did not support his $24,200 valuation and to make assurance doubly sure the conciliation commissioner reported to the judge that besides the evidence submitted he went out and made his own "personal investigation." R. 9, bottom of page.

This extraordinary type of procedure is evidence that the conciliation commissioner well knew that the evidence submitted at his hearing did not warrant such a fantastic

valuation. By introducing an unknown and mysterious factor—his "personal investigation"—an attempt was made to knock the props out from any objection that the evidence submitted does not support the valuation of $25,200. This method made the valuation proceeding a nullity by violating a fundamental principle of American jurisprudence—due process of law.

The Method Condemned.

It happened that while this procedure was going on in Ohio another like it was going on in California where the conciliation commissioner was also proceeding to fix the valuation for redemption under Section 75 (s) (3) by his "personal investigation" in addition to the evidence submitted. There also the District Court affirmed the conciliation commissioner. We quote from the opinion of the Circuit Court of appeals for the Ninth Circuit which annulled the valuation:

Moser v. *Mortgage Guarantee Company*, 1941, 123 Fed. (2d) 423:

> The conciliation commissioner's report read in part as follows (quoted from the opinion of the appellate court):
>
> "'After hearing all parties in interest and their appraisers and *after making a personal visit to the ranch and looking the property over and I talked to other property owners in the vicinity*, I came to the conclusion that the property was worth Twelve Thousand Dollars ($12,000) and that is my finding and I accordingly fixed the value at the said amount.'"

The italic emphasis is that of the appellate court.

The opinion of the appellate court says:

"In providing for the hearing the statute prescribes that the commissioner shall 'set a date for the hearing and after such hearing, fix the value of the property in accordance with the evidence submitted. . . .' But the commissioner did not abide by his opening statement nor by this requirement of the statute, for after the hearing he personally proceeded as would an appraiser preparing for a hearing, to gather his own facts and to consider his own impressions therefrom together with the 'evidence submitted.' (No evidence taken outside the hearing is included in the transcript certified to the judge.) The Act does not recognize the conciliation commissioner as a qualified appraiser nor authorize him to act in such capacity and does not authorize him to supplement the 'evidence submitted' with investigations and evidence taking of his own outside the hearing and without the knowledge of the parties to the hearing. In short, the commissioner departed from the statute in a very material and prejudicial manner.

The presentation in person or by deposition of witnesses whose testimony is to be considered, and a reasonable opportunity for cross examination, is implicit in all formal hearings such as the one under consideration. Neither of these requisites of our jurisprudence was afforded in this instance."

"What influence the evidence taken outside the hearing, proper or improper, may have had upon the conclusion reached by the commissioner, or what counter effect cross-examination or rebuttal testimony would have had upon such conclusion, can never be known.

The order appealed from is reversed, annulled and set aside."

This method of reaching judicial conclusions has likewise been recently condemned in the Third Circuit in a

regular bankruptcy proceeding, *In re Aughenbaugh*, 1942, C. C. A. 3, 125 Fed. (2d) 887. There the referee considered papers in the file not introduced in evidence at the hearing. The Appellate court held that such method violates due process of law because the parties to the hearing had no opportunity to explain or refute the outside evidence. It held that in determining an issue the court must consider solely the evidence presented at the trial of that issue.

These circuit decisions are firmly grounded upon the decisions of this court.

In *Interstate Commerce Commission* v. *Louisville*, 1913, 227 U. S. 88, it was held that even a Commission may not go outside the record in concluding an issue because only when evidence is put in the record can a party have an opportunity to "test, explain, or refute" and to "cross examine witnesses and inspect documents and offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

Akron v. *United States* (New England Division case), 1923, 261 U. S. 184, held the same.

In *United States* v. *Abilene*, 1924, 265 U. S. 234, this court again applied the rule saying that "nothing can be treated as evidence which is not introduced as such."

In *Crowell* v. *Benson*, 1932, 285 U. S. 22, it was said that "Facts conceivably known to the deputy commissioner but not put in evidence so as to permit scrutiny and contest, will not support a compensation order. . . . An award not supported by evidence in the record is not in accord with law."

We state quite frankly and unequivocally that the figure of $25,200 was not arrived at by a judicial determination. The evidence does not support it.

A Look at the Mortgage Holder's Theory of Valuation.

It is clear from the evidence submitted by the mortgage holder that the court was expected to fix the value of the farm for redemption with some relation to the amount of the first mortgage and the taxes.

At R. 27, he put in his mortgage debt at $34,702.

The witnesses put on by him gave evidence of the value at figures designed to approximate the amount of the mortgage. They were:

Chamberlain, $33,600, R. 11 ($200 per acre).

Scanlon, exactly the same $33,600. R. 11 ($200 per acre).

Osborn, $31,290 to $33,690. R. 12 ($190 to $200 per acre).

Huddilston, (after hearing the farmer debtor's witnesses at R. 12 to R. 22) dropped to $29,400. R. 23 ($175 per acre).

Cochran, the second mortgage holder (R. 26, bottom of page) who can get nothing until the first mortgage is satisfied, topped them all, and went up to $37,800. R. 26 ($225 per acre).

It is consequently apparent that the mortgage holders expected the conciliation commissioner to sanction an unlawful act by fixing a fictitious valuation that would approximate the first mortgage claim. It is important to

note that the respondent, being **the first mortgage holder, could bid the amount of his $34,702 claim without paying a cent of cash. Any other bidder or the farmer debtor would have to pay the full sum in cash. This does not fix a market value.** But it does prevent redemption.

This illegal scheme would place a two-edged sword in the hands of the mortgage holders. One edge would by a false valuation prevent redemption; the other would force a public sale at which, by bidding the mortgage claim, the farmer debtor and any other bidder would be cut off from bidding. Either edge is **calculated to cheat the law by depriving the farmer debtor of his right to redeem.**

Its success would effectually reverse this court's decision in *Wright* v. *Union Central*, 1940, 311 U. S. 273, through the device of a fictitious valuation which would defeat redemption and thus force a public sale.

The Statutory Standard of Value.

When the law is examined by which such a method of valuation is to be measured we find:

Section 75 (s) at the end of the first paragraph reads:

> "Such appraisers shall appraise all of the property of the debtor, wherever located, at its **then fair and reasonable market value**".

That provision refers to the appraisal made at the beginning of the three year stay under Section 75 (s) which was set by the conciliation commissioner at $5800. R. 27.

At Section 75 (s) (3), the law provides that:

> "Upon the request of any secured or unsecured creditor, or upon request of the debtor, the court shall

> cause a **reappraisal** of the debtor's property, or in its discretion set a date for hearing, and after such hearing **fix the value of the property, in accordance with the evidence submitted.**"

That is, the debtor may redeem his farm at its "**fair and reasonable market value**" which has been fixed "in accordance with the **evidence submitted.**"

The mortgage holders throughout the country up to the decision in *Wright* v. *Union Central*, decided December 9, 1940, 311 U. S. 273, had been violating the law by asking, and getting, a public sale to defeat the debtor's right to redeem. Here the respondent following the well-worn path, asked the bankruptcy court in this case to do the same thing—that is, to ignore the debtor's right to redeem at the "fair and reasonable market value" by holding a public sale at which the mortgage holder could, without using money, bid the amount of his mortgage claim. Because of that intervening decision the District Court held that the statute must be observed and ordered the conciliation commissioner to fix the valuation. R. 8 to 9, order of March 21, 1941.

This legal history explains the peculiar gyrations of the respondent's evidence presented to the conciliation commissioner. Though *Wright* v. *Union Central*, 1940, 311 U. S. 273, was expected to restore the right of redemption to all farmer debtors, this new device was promptly put to work to accomplish the same object as the device which this Court wrecked.

An Examination of the Evidence Submitted At the Hearing.

There is a wide cleavage between two distinct types of evidence adduced at the hearing before the conciliation commissioner which may be grouped as follows:

The Mortgage Holder's Evidence.

First, there is the evidence of the mortgage holders based upon the theory that the valuation should be determined by the amount of the liens on the property. In putting in the amount of his first mortgage at $34,702 (R. 27) the respondent showed his adherence to this theory. By statute it was irrelevant. The second mortgage holder, Cochran, showed the same attitude and put his testimony enough higher to cover well his claim of more than $2,000. (R. 26.) He valued the property up to $37,800. (R. 26.) The testimony of Chamberlain (R. 10 to 11), an official in two banks, **who did not go on the farm**, fixed the value at $33,600. Scanlon (R. 11 to 12), who is not a farmer and had not lived on a farm for fifty years, fixed it at $33,674. Osborn (R. 12) **who did not go on the farm**, set it at from $31,920 to $33,600. Huddilston (R. 22 to 24), **who had not been on the farm for five years** and who says he sold 33 acres at $14,000 or over $400 per acre in Sagamore Hills, (See map at debtor's Exhibit 1 at R. 28), a high class residence section of metropolitan Cleveland, went back to $29,400 after hearing the farmer debtor's witnesses at R. 12 to 22.

All showed the same basis of value—the amount of claims against the farm.

In several instances the mortgage holders asked questions like this: Do you know that such and such a farm was offered for such and such a price? The figure was always a high one. Of course this is not evidence. The mention of a supposed "offer" can only confuse unless it is backed up with evidence. Otherwise it is plain bluff. Evidence showing that an offer had been made to sell a farm for $230 an acre would be evidence that its value probably was no higher or the price would be higher. If actually offered and there were inquiries but no taker it would tend to prove that the price was too high—nothing more. To say to a witness "Do you know that the National Press Building was offered at a billion dollars?" is no evidence of its value.

Such was the evidence of value submitted by the respondent.

The Evidence of Other Witnesses.

Second, there is the evidence of the witnesses who had no other interest or motive than to arrive at the "fair and reasonable market value" of this farm.

Mr. Howard

R. 12 to 14

Mr. Howard had no interest in the case. He is City Planner of the Regional Association of Cleveland. He has made an extended study of that metropolitan district and

has published several works on the subject. He shows that this farm lying near the line between Cuyahoga and Summit Counties (R. 28, See Macedonia which is encircled in red on the map) can have no site value. There are already 40,000 acres of vacant un-subdivided land in Cuyahoga County. There are 80,000 acres of farms like the Carter farm which could also be subdivided. There are now 28,000 vacant lots already subdivided which would house 500,000 people. (At the same ratio the already available home site land would provide for an additional total population of 2,500,000. Before the 80,000 acres of possible farm land would be in competition, the 28,000 acres plus 40,000 acres (68,000 acres) alone would provide for a population of 1,180,000.) There are also 160,000 tax delinquent lots in the county. He also testified that the proportion of all these figures for the vicinity of this farm is higher than for the County as a whole.

For Summit County of course the amount of available farm land which is available for residence purposes is very much larger.

The United States population census shows Cuyahoga County, 1930, 1,201,455; 1940, 1,217,250 (an increase of about 16,000 in ten years). Summit County, 1930, 344,131; 1940, 339,405 (a decrease of about 4,000).

MR. ADAMS

R. 14

Mr. Adams had no interest in the case. He has owned farms and been a farmer all his life and still owns over 400 acres. He has offered his farm at $40 to $50 an acre and

has not been able to sell it although buyers have looked at it. He has been over the Carter farm and he valued it at $50 an acre or $8418.

Mr. Eagle
R. 15 to 16

Mr. Eagle is not interested in the case. He is a farmer and an appraiser of wide experience for the government and for federal land banks. He took samples of the soil as in his official appraisals. He went over every part of the farm and found some good soil. He found much light top soil with a very heavy subsoil that is very poor. Much of it is stony and underlaid with rock. He found about one-third of the peach trees frozen out and without value, leaving but two and two-thirds acres of peaches. The house roof is about gone—the singles curling up. His valuation is $7795.00 or about $46 per acre.

Mr. Huber
R. 17 to 19

Mr. Huber had no interest in the case. He has been a farm real estate dealer for more than thirty years and has sold hundreds of farms, many in this very community. He went over the farm. It has no scenic value whatever. Because it is situated between the two cities, although he had serious doubts, he added some to what he deemed the real value to be. He named $12,040, or $71.66 per acre.

MR. PLECHATY
R. 21 to 22

Mr. Plechaty has been a farmer for fourteen years. He was a farm real estate dealer for many years in this part of the state. He was looking for a farm in the vicinity for himself last year until he bought the Bowman farm nearby.

Of this Bowman farm Mr. Huber had testified, (R. 19), that "It had about 98 acres and he sold it to Plechaty for $12,000. It had excellent buildings, the barn 'being one that nobody would want to build'. The house has three baths, vapor heat, and is in very good condition. It also had spring water running by gravity right into the barn and house, and in the orchard on out to the creek."

Mr. Plechaty has been on the Carter farm and knows it. He knows other farms nearby that are for sale. He values the Carter farm at $6500 to $8500, or about $39 to $50 per acre.

The Two Valuation Theories Compared.

There can be but one conclusion in considering these valuations running from $6500 to $12,400 by the disinterested witnesses, and from $29,464 to $37,883 by the mortgage holders. The disinterested witnesses were confronted with the difficult job of fixing the actual value of the farm as it is now. They were not subject to any other consideration. The mortgage holder's witnesses were thinking of what **the value should be in relation to the mortgage claims.** They were concerned with a value that would freeze out the debtor from his right of redemption under Section 75 (s).

The court can not accede to such a scheme without stultifying the laws of the United States and the decisions of this court.

CONCLUSION.

The method of valuation for the purpose of redemption provided in Section 75 (s) (3) of the farmer debtor law is violated by the method employed by the bankruptcy court, and sustained by the appellate court on the theory there was no abuse of "judicial discretion."

The effect of the methods pursued presents an important question concerning the administration of the statute.

The method of the conciliation commissioner in fixing valuation by his "personal investigation" as sustained by the courts below is in conflict with the decisions in other circuits and with the decisions of this court.

If the purpose of the farmer debtor law, which is to afford to the farmer debtor an honest opportunity to redeem his farm at its present real market value, is to be thwarted by merely setting up a fictitious valuation which will force a public sale at which the mortgage holder may without paying cash bid the amount of his lien, then the decision of this court in *Wright* v. *Union Central*, 1940, 311 U. S. 273, is overruled and the farmer debtor law is innocuous to holders of farm mortgages which overtop the value of their security—the mortgage holders may take the farms.

Wherefore your petitioner prays that a writ of certiorari may issue.

Respectfully submitted,
ELMER MCCLAIN, Lima, Ohio,
Counsel for the Petitioner.

Lima, Ohio
February 6, 1943

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IN THE

Supreme Court of the United States

OCTOBER TERM 1942.

No. 750

In the Matter of
THAD BENSON CARTER,
Farmer Debtor.

THAD BENSON CARTER,
Petitioner,

v.

GEORGE A. KUBLER,
Respondent.

REPLY BRIEF FOR THE PETITIONER.

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Petitioner.

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REPLY BRIEF FOR THE PETITIONER.

On behalf of the petitioner there are a few statements contained in the respondent's brief which should be noticed. They will be discussed in the order of the paging of respondent's brief.

Page 2 of Respondent's Brief.

(The last portion of the page.)

There is nothing in the record to show the nature of the rental order. Whether or not that order required the petitioner to pay taxes is not known. If he was ordered to pay taxes such an order has been held to be void and of no effect and not warranted in the statute which orders that:

> "Such rental shall be paid into court, to be used, first, for payment of taxes and upkeep of the property, and the remainder to be distributed among the secured and unsecured creditors and applied on their claims, as their interests may appear." Section 75 (s)(2).

The Second Circuit in *In re Mahaffey*, CCA 2 (1940) 129 Fed. (2d) 292, held such an order to pay taxes to be absolutely void and upheld the noncompliance of it by the farmer debtor.

The District Court of Iowa in *In re Peterson*, (1941), 39 Fed. Supp. 931, held such an order to be not one made pursuant to the provisions of Section 75 and therefore that disobedience of it was not a ground for termination of the case.

The record shows that the respondent made no objection whatever to the former appraisal of $5800. It is now idle to assert that it was not the "fair and reasonable market value" of the farm. The only authority under which the conciliation commissioner could find its value was the following statutory provision:

> "Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value." Section 75 (s) (first unnumbered paragraph).

There is no evidence anywhere in the record that the farmer debtor did not pay the rental. Even if he had not paid the rental it is no excuse for defeating his right to redeem by setting a fictitious and impossible value for redemption. *Wright* v. *Union Central*, (1940), 311 U. S. 273.

Page 2 of Respondent's Brief

(At bottom of the page.)

The statement that "such claims [that devices were employed to defeat the purpose of Section 75] are unsupported by the record evidence" is not warranted.

It is true that they are not all supported by the "record evidence" but as indicated in the references to the record which are shown at pages 18 to 21 of the petitioner's brief, the various parts of the **record** within that part which contains the evidence and elsewhere demonstrates that three different methods or devices of evading the purpose of Section 75 were employed.

Page 8 of Respondent's Brief.

(Top half of page.)

Here the statements at page 2 of the respondent's brief are repeated. They are discussed at page 2 of this reply brief.

In addition the respondent's brief says that no evidence was taken when the original appraisal of $5800 was arrived at. That is true, but the respondent had four months within which to file objections, exceptions and take appeals.

No claim is made that any objection or appeal was made or taken by any one.

> "The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: *Provided*, That in proceedings under this section, either party may file objections, exceptions and take appeals within four months from the date that the referee approves the appraisal." Section 75 (s) first (unnumbered) paragraph.

There is not a scintilla of any evidence or claim that the $5800 appraisal approved by the conciliation commissioner under Section 75 (s), first (unnumbered) paragraph, was not the "fair and reasonable market value" as required by statute.

On the contrary the record at R. 26, bottom of page, and R. 27, top of page, shows the conciliation commissioner stating that the "Appraisement of Carter's farm in these proceedings was $5800."

The record at R. 39 to 41 contains the affidavits of two of the original appraisers who state that the $5800 was "the then fair and reasonable market value" and "that said conciliation commissioner, Harry F. Wood, at the time when the appraisal was reported to him by said appraisers, said that $5800 was no more than the farm was worth, and he expressed his agreement with the appraisers".

Page 8 of Respondent's Brief.

(Bottom of page.)

That part of the evidence whereon the conciliation commissioner stated that he had originally fixed the value at $5800 in the same proceeding (R. 26 to 27) was as much a

part of the evidence and record before him as any other evidence on which he ruled.

The finding of the district judge is vitiated by his entire disregard of the original $5800 valuation fixed by the same conciliation commissioner upon the ground (as stated by the judge at bottom of R. 35) that "However, that value, the commissioner stated, was made for taxation purposes". There is no statement anywhere in the record that supports this statement. If it was made in private conversation between the conciliation commissioner and the judge, such basis is an additional reason for upsetting the findings of the district court. It is directly contrary to the statement of the conciliation commissioner at R. 26 and 27.

Page 10 of Respondent's Brief.

(Middle of the page.)

The reference evidently is to the statement made by the respondent at the close of the evidence on valuation at R. 27 that the respondent's mortgage was $34,702.53. This evidence was immaterial—it was no element for fixing valuation. It was undoubtedly considered by the court.

Page 10 of Respondent's Brief.

(Under "Conclusion")

The respondent puts this proposition to this court:

> "In conclusion, may we respectfully submit on behalf of the respondent that since Mr. Carter has held and resided on the farm in question for more than eight years since these bankruptcy proceedings were insti-

tuted and has reaped the benefits and income from the use of such farm, and that he has not paid a cent of interest on this mortgage obligation since September, 1931, and that there has been no reduction of the mortgage debt since that time, and that taxes and rental value fixed in 1936 were not even paid, it is certainly not unreasonable, or in derogation of the farm debtor's rights, to have this litigation concluded."

These *argumentum ad hominem* statements are partly untrue and partly unfair. The same kind of statements were made by the mortgage holders and repudiated by this court in

John Hancock v. *Bartels*, (1939), 308 U. S. 180;
Borchard v. *California Bank*, (1940), 310 U. S. 311;
Wright v. *Union Central*, (1940), 311 U. S. 273;
Wright v. *Logan*, (1942), 315 U. S. 139;
Wragg v. *New Orleans*, (1943), ... U. S. ....., 63 S. Ct. 273.

This mode of argument is further evidence, if more is needed, of the arguments pressed upon the courts below in the realm of Lincoln's expression that "some means may be found to cheat the law".

On the contrary we think the petitioner, and every other farmer debtor, is entitled to genuine respect for the statute of the United States which intends that the farmer debtor shall have a real opportunity to redeem his farm at its "fair and reasonable market value" and that due process of law shall be observed in arriving at that value. Such respect for the purpose of the statute requires that the amount of liens against the farms shall be absolutely disregarded in fixing that value. Otherwise "the law is cheated" of its beneficent purpose.

"Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (*John Hancock Mutual Life Ins. Co.* v. *Bartels*, [308 U. S. 180]; *Kalb* v. *Feuerstein*, [308 U. S. 433]), lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." *Wright* v. *Union Central*, (1940), 311 U. S. 273 at 279.

Respectfully submitted,

ELMER MCCLAIN, Lima Ohio,
Counsel for the Petitioner, Thad Benson Carter.

March 13, 1943.

FILE COPY

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 18

THAD BENSON CARTER,

Petitioner,

vs.

GEORGE A. KUBLER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CERTIORARI GRANTED APRIL 5, 1943

BRIEF
ON BEHALF OF THE PETITIONER

ELMER MCCLAIN,
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NOTE: All emphasis in this brief is supplied except where it is otherwise stated.

The Question Before This Court.

The issue in this case arises out of that portion of Chapter VIII of the Bankruptcy Act, entitled "Provisions

for the Relief of Debtors" known as the farmer debtor law. Section 75. 11 U. S. C. 203. The particular part of the section involved is Section 75(s)(3) relating to the farmer debtor's right to redeem his farm within three years from the issuance of a stay order under Section 75(s)(2).

Section 75(s)(2) provides for the issuance of a stay of all proceedings against the farmer debtor and his property for three years, following certain preliminaries including an appraisal of his property at its "then fair and reasonable market value."

Section 75(s)(3), in its applicable portion, then reads as follows:

> "At the end of three years, or prior thereto, the debtor may pay into court **the amount of the appraisal of the property**. . . . Provided that upon request . . . the court **shall** cause a reappraisal of the debtor's property, or in its discretion set a date for **hearing** and after **such hearing,** fix the value of the property **in accordance with the evidence** submitted, and the debtor shall then pay the value so arrived at into court . . . and thereupon the court shall by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor" . . . .

In granting certiorari, at 318 U. S. 753, this court limited the issue to "the first question presented by the petitioner".

That question, submitted by the petitioner at page 3 of his petition for certiorari is this:

> In fixing the valuation at which a farmer debtor shall redeem his farm does the statutory provision in Section 75 (s) (3) [11 USC 203(s)(3)] that the court **shall** "set a date for **hearing,** and after **such hearing,** fix the value of the property, **in accordance with the evidence submitted**" permit a conciliation commissioner to fix

such valuation "upon a **personal investigation by the conciliation commissioner**" in addition to the evidence submitted to him at a hearing? R. 9, next to the last paragraph.

This brief is limited to that question.

A letter from the clerk to counsel, dated April 5, 1943, contained the additional statement that "counsel are requested to discuss in their briefs and on the oral argument the question whether the error, if any, was cured by the District Court's review".

OPINIONS BELOW

In the District Court

The opinion of the District Court has not been published. It appears in the record at R. 35 to 37.

In the Circuit Court of Appeals.

No opinion was rendered in the Circuit Court of Appeals. The final order, reported at 131 Fed. (2d) 222, appears in the record at R. 37 to 38.

STATEMENT OF THE CASE.

At the beginning of the three year stay under Section 75(s) the conciliation commissioner approved the appraisement of the farm by three appraisers at $5800. Statement of the conciliation commissioner: R. 26, bottom of page to R. 27, top of page. Statement of two appraisers: R. 39 to 41. This original $5800 appraisement was required by Section 75 (s), first unnumbered paragraph, and was **the value at which the redemption was to be made** by the

farmer debtor unless, after the lapse of time, the farmer debtor or a creditor should seek a reappraisement, pursuant to Section 75(s)(3).

At the end of the three year stay an order of sale was issued. However, when this court in *Wright* v. *Union Central*, 1940, 311 U. S. 273, decided there may be no sale under Section 75(s)(3) until the farmer debtor has had an opportunity to redeem, the order of sale was revoked and the conciliation commissioner was directed to determine by a hearing the value of the farm pursuant to Section 75(s)(3). R. 8 to 9.

Evidence was taken by the conciliation commissioner. R. 10 to 28. He reported to the judge that "after hearing the testimony given by the several witnesses, and studying the briefs furnished by the defendant and the plaintiff, and **upon a pefsonal investigation by the conciliation commissioner** of the value of said farm I hereby fix the value of said farm at $150 per acre". ($25,200). R. 9. This sum was practically **four and one-third times the original $5800 appraisement** by the three appraisers which had been approved by him.

The farmer debtor filed a petition for review by the district judge in which he made specific objections to the "personal investigation by the conciliation commissioner" outside of the evidence submitted to him. These objections were made in "Specification of Errors" numbered 5, 6, 7, and 8, in the petition for review. R. 31.

Upon review the judge issued his memorandum opinion reducing the valuation to $20,000, which was nearly three and one-half times the original appraisal. R. 35. Referring to the former appraisal before the conciliation commissioner of the fair and reasonable market value of the farm at $5800 the judge's opinion stated: "However, that value the commissioner stated was made **for taxation purposes.**" R. 35, bottom of page. There is **no such statement in the record.** The statement of the conciliation com-

missioner concerning the original $5800 appraisal: R. 26, bottom of page to R. 27, top of page.

The farmer debtor filed an application for rehearing, which was denied, setting forth the affidavits of two of the three appraisers, stating that originally in the same proceeding they had appraised the farm at $5800 and that they considered that sum to be the then **fair and reasonable market value**; and further stating that the same conciliation commissioner at the time when the appraisal was reported to him said that "$5800 was no more than the farm was worth and he expressed his agreement with the appraisers in fixing the appraisement of said farm at $5800." R. 39 to 41.

The petitioner's "Statement of Points" numbered 4 and 5 in his appeal to the Court of Appeals asserted that the District Court erred in basing its final order upon the statement that the original appraisal of $5800 was for taxation purposes and upon the conciliation commissioner's order of reappraisement based upon a personal investigation by the conciliation commissioner made outside of the hearings and without any opportunity being afforded to offer counter evidence or to cross examine concerning it. R. 43.

The appellate court without any opinion affirmed the district court in an order stating "there was no abuse of judicial discretion in the finding that the reasonable market value of the farm land in question was $20,000." R. 45.

SPECIFICATION OF ERRORS.

1.

The bankruptcy court based the valuation for redemption upon a personal investigation made by the conciliation

commissioner wholly outside of the evidence submitted at a hearing held by the conciliation commissioner to determine such valuation.

2.

It defeated the farmer debtor's statutory right of redemption by fixing a valuation contrary to the evidence submitted at a hearing.

3.

It fixed a valuation for redemption at a price grossly in excess of the official valuation previously found by the court in the same proceeding, there being no evidence of any such increase in value.

4.

It considered the amount of liens against the farm in fixing its valuation for the purpose of redemption from such liens.

5.

The appellate court held that a bankruptcy court may exercise a judicial discretion in fixing the value of a farm for redemption under the provisions of such law. The statute prescribes that the valuation shall be set at its fair and reasonable market value as disclosed by the evidence submitted at a hearing held for the purpose of determining such value.

6.

The bankruptcy court sustained an excessive valuation of the farmer debtor's farm for redemption by a conciliation commissioner by finding that the conciliation commissioner's former official valuation in the same proceeding was made for taxation purposes whereas there was no evidence to support such statement.

Summary of the Argument.

The question presented concerns the very heart and center of the farmer debtor law. The redemption provisions of Section 75 are the culmination of the Act. Every other provision of the act is subsidiary to it. The methods employed here defeat the entire purpose of the law.

The statute definitely lays down the method of valuation. This court has repeatedly held that Section 75 prescribes an orderly procedure which is a mandate that must be obeyed. The bankruptcy court violated the statute by preventing redemption. It did it through the device of increasing the valuation up to the neighborhood of the liens and hiding the discrepancy between evidence and conclusion under the guise of "personal investigation", and totally disregarding its own original valuation.

An examination of the evidence demonstrates the unlawful theory under which the mortgage holders pressed upon the conciliation commissioner an inflated fictitious valuation made to measure up to the mortgage liens.

The error complained of was not cured by the District Court's review. The original official appraisement of $5800 in the same proceeding under Section 75(s), first unnumbered paragraph, was wholly disregarded. Contrary to the clear and undisputed evidence the District Court found that the original $5800 appraisal in the same proceeding before the conciliation commissioner was for "taxation purposes".

The error committed by the conciliation commissioner in making his "personal investigation" wholly outside of the hearing conducted before him was not considered by the District Court on review.

Since the judge upon review did not reject the extra judicial "personal investigation" by the conciliation com-

missioner, and in addition totally misconstrued the record concerning the conciliation commissioner's original appraisal at $5800 and merely reduced the conciliation commissioner's valuation from four and one-third to nearly three and one-half times his original valuation, the error was not cured.

The Circuit Court of Appeals, in holding that there was no abuse of "**discretion**" in the finding of value by the bankruptcy court totally misconstrued that portion of Section 75(s)(3) which provides that "the court shall cause a reappraisal of the debtor's property, or in its **discretion** set a date for hearing, **and after such hearing, fix the value of the property in accordance with the evidence submitted**". The court has no discretion to disregard the clear statutory provision that it shall fix the value **at a hearing in accordance with the evidence submitted.**

ARGUMENT.

This Case Involves the Whole Purpose of the Farmer Debtor Law.

The **purpose** of the farmer debtor law, like that of the other "Provisions for the Relief of Debtors" (Heading of Chapter VIII) in the Bankruptcy Act relating to railroads, corporations and municipalities, **is to keep the owner debtor in permanent possession of the mortgaged property.** This is to be accomplished by paying to the mortgagee **the value of the security** instead of permitting him to take the security itself. As this court has declared, "There is no constitutional claim of the creditor to more than that." *Wright* v. *Union Central*, 1940, 311 U. S. 273, 278. If the valuation is inflated beyond the value, the mortgagee takes the property and the purpose of the law is defeated.

In the same decision this court also declared, and repeated the declaration in another decision, that "the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress . . . lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." *Wright* v. *Union Central*, 1940, 311 U. S. 273, 279. *Wright* v. *Logan*, 1942, 315 U. S. 139, 140.

The administrative machinery prescribed by Section 75 and repeatedly held by this court to be an orderly procedure which is a mandate of the statute is designed to accomplish redemption and it is very explicit. It is embodied in Section 75(s)(3) where it is provided that the

farmer debtor may pay into court the value of his mortgaged property. The mortgaged property is then free from all liens and the farmer debtor receives his discharge.

If this legal machinery is misused the whole statute is defeated and all the antecedent procedure has been in vain. Of the redemption provisions those pertaining to fixing the valuation of the security are their core and center. If a fictitious inflated valuation is set, there can be no redemption and, as Lincoln said, "the law is cheated."

The statutory method set up in Section 75 and the method employed by the bankruptcy court in this case are therefore first presented.

The Mandate of the Statute Governing Valuation and the Method Employed.

The Statutory Method.

"Such appraisers shall appraise all of the property of the debtor . . . at its then **fair and reasonable market value.**" Section 75(s), first (unnumbered) paragraph.

"Upon request . . . the court **shall** cause a reappraisal . . . or in its discretion **set a date for hearing and after such hearing, fix the value of the property, in accordance with the evidence submitted.**" Section 75(s)(3).

The Method Employed.

The conciliation commissioner's increase of the farm valuation from his original official appraisal of $5800 to $25,200 (four and one-third times the original appraisal) **was not determined by the evidence submitted.** It was undoubtedly influenced by the fact that the first mortgage amounted to $34,702 and the second mortgage amounted

to $2000 more. R. 26, last full paragraph. R. 27, bottom of page.

Neither the conciliation commissioner, the judge, nor the appellate court justified the increase on the basis of the evidence submitted at the hearing. The following quotations prove this statement:

The **conciliation commissioner** said (after stating that he heard the evidence and studied the briefs of the parties): "**and upon a personal investigation** by the conciliation commissioner of the value of said farm, I hereby fix the value of said farm at $150 per acre" (168 acres at $150, $25,200). R. 9, bottom of page.

The **judge** upon review said nothing about the extra judicial "personal examination" by the conciliation commissioner but went further in committing error when, referring to the original $5800 appraisal by the conciliation commissioner in the same proceeding, he said: "However, **that value** the commissioner stated, **was made for taxation purposes.**" R. 35, bottom of page. **This statement is not supported by any evidence;** the conciliation commissioner stated that "**the former appraisement of Carter's farm in these proceedings was $5800**". R. 26, bottom of page to top of page 27. No appraisal for taxation is provided or mentioned in Section 75.

The **judge** also stated: "it does seem to me the appraisal is high." R. 36, middle of page. "The buildings and fences are probably of little value for appraisal purposes and the timber land probably the same." R. 36, middle of page. "The testimony gives the impression that there is not an active market for farm land in this location." R. 36, bottom of page. "It is seriously doubted that such a market value [for a country place] ever will exist and

it must be regarded as merely speculative." R. 37, top of page.

The **appellate court** merely said: "there was no abuse of judicial discretion." R. 45.

Neither the conciliation commissioner, the judge of the district court nor the appellate court discussed the actual testimony. It will be discussed later in this brief.

Devices Employed to Defeat the Law.

This court has at least five times stated the purpose of the law very clearly and protected it. In *Wright* v. *Union Central*, 1940, 311 U. S. 273, at page 279 it was said:

> "This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. . . . Safeguards were provided to protect the rights of secured creditors throughout the proceedings, to the extent of the **value of the property.** . . . There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act."

The opinion cited four other decisions of this court in support of the statement just quoted: *Wright* v. *Union Central*, 1938, 304 U. S. 502; *John Hancock* v. *Bartels*, 1939, 308

U. S. 180; *Kalb* v. *Feuerstein*, 1940, 308 U. S. 433; *Borchard* v. *California Bank*, 1940, 310 U. S. 311.

In the never-ending contest by which mortgage holders seek to circumvent the repeated decisions of this court, there were employed in this instance three devices.

First Device, an Inflated Valuation, the Device in Issue Here, Prevents Redemption.

The price of redemption in Section 75 is the **"amount of the appraisal"** (Section 75(s)(3)) and the standard of the appraisal is the **"fair and reasonable market value"** (Section 75(s) first and unnumbered paragraph), **which the court shall "fix" . . . "in accordance with the evidence submitted."** Section 75(s)(3).

One device employed in the instant case was to set the revaluation near the amount of liens without regard to value. An attempt was then made to smother out objections that the evidence submitted does not support that valuation of four and one-third times the original by a statement that **the evidence submitted was supplemented by the "personal investigation" of the conciliation commissioner.** R. 9. He knew that in the same proceeding the appraisal made by his appraisers was $5800 which he had approved without objection or appeal. R. 26, bottom of page and R. 27, top of page. Affidavits of appraisers at R. 39 and 40. Clerk's docket entries R. 4 to 8, passim. He knew that **the evidence submitted** did not support a raise of four and one-third times $5800 to $25,200, therefore he strove to make it clear that **in addition to the evidence submitted he had made his "personal investigation" which could not be cross examined or analyzed on review.**

Second Device, an Inadequate Time to Redeem.

Although not in issue here, because the court has limited the question to the single one stated at the beginning of this brief, nevertheless it is pertinent to show that the first device was supplemented by other devices in pursuance of a general plan. For example another device inimical to redemption was making the payment of the redemption money due within a period too short for redemption. The conciliation commissioner's order effective August 16 required redemption by October 15. It was filed August 6, and by Rule 62, and 28 U. S. C. 874, became effective in ten days. R. 9. It is not to be supposed that any farmer debtor, so seriously involved as to invoke Section 75, can within three years earn enough cash to redeem his farm. A real estate loan can not be applied for until it is known exactly how much is needed and when. An abstract, including the farmer debtor proceeding, must be completed, examined, and the objections to it met. Finally the title must be approved by the lender. These steps would ordinarily require about six months. The Judge allowed but 18 days and from the denial of the petition for rehearing it was but 6 days. R. 37 and 38. R. 41.

Third Device, Farming Operations Prohibited.

Another supplemental device was the order prohibiting "any planting of any description until after October 15, 1941". R. 9, and top of page 10. This device of interfering with the operation of the farm as a going concern was likewise inimical to the obtaining of a loan.

We now proceed to examine the evidence.

THE EVIDENCE.

Some Extrajudicial Procedure in Violation of Orderly Procedure of the Statute.

This extraordinary type of procedure by **"personal investigation"** is evidence that the conciliation commissioner well knew that the evidence submitted at his hearing did not warrant such a fantastic increased valuation. By introducing an unknown and mysterious factor—his "personal investigation"—an attempt was made to knock the props out from any objection that the evidence submitted does not support the newly increased valuation of $25,200. This gross violation of orderly procedure made the valuation proceeding a nullity by violating a fundamental principle of American jurisprudence—due process of law.

The Method Has Already Been Condemned.

The general method employed here is universally condemned in any judicial proceeding. An example is the sharp criticism expressed by the Supreme Court of Ohio in: *Railroad* v. *Bolen*, 1907, 76 Ohio State 376, at page 385, concerning a view of real estate:

> "If the testimony is to be taken in part out of court, and as to that part in utter silence, how can the parties cross examine? How can they offer rebutting testimony? How can the counsel intelligently argue the questions of fact? In short, how is it possible to have a fair trial?"

This court said of the right of cross examination in: *Ottawa* v. *Stewart*, 1866, 70 U. S. (3 Wall.) 269:

> "the right is a valuable one as a means separating hearsay from knowledge; error from truth; opinion from fact, and inference from recollection."

In *Interstate Commerce Commission* v. *Louisville*, 1913, 227 U. S. 88, it was held that even a *quasi* judicial commission may not go outside the record in concluding an issue because only when evidence is put in the record can a party have an opportunity to "test, explain, or refute" and to "cross examine witnesses and inspect documents and offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

Akron v. *United States* (New England Division case), 1923, 261 U. S. 184, held the same.

In *United States* v. *Abilene*, 1924, 265 U. S. 234, this court again applied the rule saying that "nothing can be treated as evidence which is not introduced as such."

In *Crowell* v. *Benson*, 1932, 285 U. S. 22, it was said that "Facts conceivably known to the deputy commissioner but not put in evidence so as to permit scrutiny and contest will not support a compensation order. . . . An award not supported by evidence in the record is not in accord with law."

It requires but a little contemplation of the "personal investigation" method to disclose its viciousness. Did the conciliation commissioner go alone? Or was he accompanied by other parties, interested or disinterested? Did he view the right property? Possibly he misread the T4S R6E for T6S R4E and saw a different property miles away. Did he know where the lines of the property run? Possibly he considered that a building which he thought was on the property was worth $10,000 whereas it was on another property. The victim of such a "personal investigation" is deprived of any opportunity to correct possible errors.

The method pursued here has been condemned in a farmer debtor proceeding. While this procedure was going on in Ohio another like it occurred in California where the conciliation commissioner also proceeded to fix the valuation for redemption under Section 75(s)(3) by his "personal investigation" in addition to the evidence submitted. There also the judge affirmed the conciliation commissioner.

We quote from the opinion of the Circuit Court of Appeals for the Ninth Circuit which reversed the conciliation commissioner and the district judge and annulled the valuation, because the "orderly procedure" of the statute was not followed:

Moser v. *Mortgage Guarantee Company*, CCA 9, 1941, 123 Fed. (2d) 423:

The conciliation commissioner's report read in part as follows:

> "'After hearing all parties in interest and their appraisers and *after making a personal visit to the ranch and looking the property over and I talked to other property owners in the vicinity*, I came to the conclusion that the property was worth Twelve Thousand Dollars ($12,000) and that is my finding and I accordingly fixed the value at the same amount.'" The italic emphasis is that of the appellate court.

In its opinion the appellate court said that "the commissioner misconceived the **plain direction of the statute**", citing *John Hancock* v. *Bartels*, 1939, 308 U. S. 180, and *Borchard* v. *California Bank*, 1940, 310 U. S. 311.

The opinion of the appellate court further said:

> "In providing for the hearing the statute prescribes that the commissioner shall 'set a date for the hear-

ing and **after such hearing, fix the value of the property in accordance with the evidence submitted.** . . .' But the commissioner did not abide by his opening statement nor by this requirement of the statute, for **after the hearing he personally proceeded as would an appraiser preparing for a hearing, to gather his own facts and to consider his own impressions therefrom** together with the 'evidence submitted.' (No evidence taken outside the hearing is included in the transcript certified to the judge.) **The Act does not recognize the conciliation commissioner as a qualified appraiser nor authorize him to act in such capacity and does not authorize him to supplement the 'evidence submitted' with investigations and evidence taking of his own outside the hearing and without the knowledge of the parties to the hearing.** In short, the commissioner departed from the statute in a very material and prejudicial manner.

The presentation in person or by deposition of witnesses whose testimony is to be considered, and a reasonable opportunity for cross examination, is implicit in all formal hearings such as the one under consideration. Neither of these requisites of our jurisprudence was afforded in this instance."

"What influence the evidence taken outside the hearing, proper or improper, may have had upon the conclusion reached by the commissioner, or what counter effect cross-examination or rebuttal testimony would have had upon such conclusion, can never be known.

The order appealed from is reversed, annulled and set aside."

This method of reaching judicial conclusions has likewise been recently condemned in the following decision in the Third Circuit in a regular bankruptcy proceeding:

In re Aughenbaugh, 1942, CCA 3, 125 Fed. (2d) 887. There the referee in bankruptcy considered papers in the file not introduced in evidence at the hearing. The Appellate court held that such method violated due process of law because the parties to the hearing had no opportunity to explain or refute the outside evidence. It held that in determining an issue the court must consider solely the evidence presented.

Likewise the Ninth Circuit in *Corey* v. *Blake*, 1943, CCA 9, 136 Fed. (2) 162, has very recently reversed a conciliation commissioner and a judge because they failed to observe "orderly procedure" in the administration of the appraisal provisions in Section 75(s). The court said:

> "The question is whether the orderly procedure which subsection (s) is designed to provide was followed in this case," citing the *Bartels* and *Borchard* decision of this court.

An order of sale was granted by the conciliation commissioner and sustained by the judge for alleged disobedience to rental order following an appraisal. The conciliation commissioner had ordered rental to be paid but the appellate court held that it was not an order "made pursuant to this section" [Section 75(s)(2)] because the record failed to show appointment of appraisers. The record did show the following:

> (1) A report signed by three men who styled themselves "appraisers appointed by the court" etc. "in the above entitled matter".
>
> (2) This report was endorsed "Approved and accepted by stipulation of parties & counsel".
>
> (3) An entry of the same date in the record book of the conciliation commissioner recited: "Mr. Cragin [an 'appraiser'] examined on appraisal . . . appraisal stipulated to by counsel".
>
> (4) The conciliation commissioner in a subsequent

order stated that on the same date, pursuant to notice to creditors a meeting was held for the purpose of considering an appraisal and that he presented "the official appraisal" and the parties "stipulated that the appraisal returned by the official appraisers appointed by this court be and is the value of the property, and the court thereupon approved and adopted said appraisal".

The appellate court held that the "approval" of the appraisal, not having been appealed, could not be reviewed. "But", said the court "although we may not review that approval, we may consider its effect, if any. We think it had no effect whatever;". It held that the provision in Section 75(s) that "the referee . . . shall designate and appoint appraisers" was never complied with. There having been no order appointing appraisers there was no appraisal, and consequently no valid rental order could be made. The court concluded that no "orders of the court made pursuant to this section" 75(s) had been disobeyed. "Thus," the opinion continued, "instead of following the orderly procedure which the statute was designed to provide the Commissioner followed a disorderly and unauthorized procedure" citing the *Bartels* and *Borchard* decisions of this court.

We state unequivocally that the figure of $25,200 was not arrived at by a judicial determination in compliance with the "orderly procedure" of the statute. An examination of the evidence demonstrates it.

The Mortgage Holders' Standard of Valuation.

It is clear from the evidence submitted by the mortgage holder that the court was expected to fix the value of the farm for redemption with some relation to the amount of the mortgage.

At R. 27, he put in his mortgage debt as $34,702.

The witnesses put on by him gave evidence of the value at figures approximate to the amount of the mortgage. They were:

Chamberlain, $33,600. R. 11 ($200 per acre).

Scanlon, exactly the same $33,600. R. 11 ($200 per acre).

Osborn, $31,290 to $33,600. R. 12 ($190 to $200 per acre).

Huddilston (after hearing the farmer debtor's witnesses at R. 12 to R. 22) dropped to $29,400. R. 23 ($175 per acre).

Cochran, the second mortgage holder (R. 26, bottom of page) who can get nothing until the first mortgage is satisfied, topped them all, and went up to $37,800. R. 26 ($225 per acre).

This analysis of the evidence explains the peculiar gyrations of the testimony of respondent's witnesses. Though *Wright* v. *Union Central*, 1940, 311 U. S. 273, was expected to restore the right of redemption to all farmer debtors, this new device was promptly put to work to accomplish the same object as the old device which this Court wrecked.

It is consequently perfectly apparent that the mortgage holders expected the conciliation commissioner to sanction an unlawful act by fixing a fictitious valuation that would approximate the first mortgage claim. It is important to note that the respondent, **the first mortgage holder, could bid the amount of his $34,702 claim without paying a cent of cash. Any other bidder or the farmer debtor would have to pay the full sum in cash.**

This does not fix a market value; it does prevent redemption.

This illegal scheme would place a two-edged sword in the hands of mortgage holders. One edge would by a false valuation prevent redemption; the other would enforce a public sale at which, by bidding the mortgage claim, the farmer debtor and any other bidder would be cut off from bidding. Either edge is **calculated to cheat the law by depriving the farmer debtor of his right to redeem**, and to defeat this court's decision in *Wright* v. *Union Central*, 1940, 311 U. S. 273, making the farmer debtor's right to redeem superior to a request for a public sale. Thereby the "right" to redeem is turned wrong side out, by lip service to the law, and becomes no right at all.

The Statutory Standard of Value.

When the law by which valuation is to be measured is examined, we find:

Section 75(s) at the end of the first paragraph reads:

> "Such appraisers shall appraise all of the property of the debtor, wherever located, at its **then fair and reasonable market value.**"

That provision refers to the appraisal made at the beginning of the three-year stay under Section 75(s) which was set by the conciliation commissioner at $5800. R. 27.

At Section 75(s)(3), the law provides that:

> "Upon the request of any secured or unsecured creditor, or upon the request of the debtor, the court shall cause a **reappraisal** of the debtor's property, or in its discretion set a date for hearing, and after such hearing **fix the value of the property, in accordance with the evidence submitted.**"

That is, the debtor may redeem his farm at its "**fair and reasonable market value**" which has been fixed "in accordance with the **evidence submitted.**" It does not say, such value as the conciliation commissioner shall find, but "**in accordance with the evidence submitted.**"

A Resume of the Evidence Submitted at the Hearing.

There is a wide cleavage between two distinct types of evidence adduced at the hearing before the conciliation commissioner which may be grouped as follows:

The Mortgage Holders' Evidence.

First, there is the evidence of the mortgage holders based upon the theory that the valuation should be determined by the amount of the liens on the property. In putting in the amount of his first mortgage at $34,702 (R. 27) **the first mortgage holder** showed his adherence to this theory. By statute it was irrelevant; it had no place at all at the hearing. The **second mortgage holder, Cochran,** showed the same attitude and put his testimony enough higher to cover well his claim of more than $2,000. (R. 26). He valued the property up to $37,800. (R. 26). The testimony of **Chamberlain** (R. 10 to 11), an official in two banks, **who did not go on the farm,** fixed the value at $33,600. **Scanlon** (R. 11 to 12), who is not a farmer and had not lived on a farm for fifty years, fixed it at $33,674. **Osborn** (R. 12) **who did not go on the farm,** set it at from $31,920 to $33,600. **Huddilston** (R. 22 to 24), **who had not been on the farm for five years** and who says he sold 33 acres at $14,000 or over $400 per acre in Sagamore Hills (See map at debtor's Exhibit 1 at R. 28), a high class residence section of metropolitan Cleveland, went back to $29,400 after hearing the farmer debtor's witnesses at R. 12 to 22.

All showed the same basis of valuation—the amount of claims against the farm.

In several instances the mortgage holders asked questions like this: Do you know that such a farm was offered

for such a price (a high one)? This is not evidence. The mention of a supposed "offer" can only confuse unless it is backed up with evidence. Otherwise it is bluff. Evidence showing that an offer had been made to sell a farm for $300 an acre might be evidence that its value probably was no higher for otherwise the price should be higher. If actually offered and there were inquiries but no taker it would tend to prove that the price was too high—nothing more. To say to a witness "Do you know that the National Press Building was offered at a billion dollars?" is no evidence of its value.

Such was the evidence of value submitted by the respondent.

The Evidence of Other Witnesses.

Second, there is the evidence of the witnesses who had no other interest or motive than to arrive at the "fair and reasonable market value" of this farm.

Howard
R. 12 to 14

Howard had no interest in the case. He is City Planner of the Regional Association of Cleveland. He has made an extended study of that metropolitan district and has published several works on the subject. He shows that this farm lying midway between Cleveland and Akron (R. 28. See Macedonia which is encircled in red on the map) has no site value. In Cuyahoga County (Cleveland) alone there are already 40,000 acres of vacant un-subdivided land. There are 80,000 acres of farms like the Carter farm which could also be subdivided. There are now 28,000 vacant lots already subdivided which would house

500,000 people. There are also 160,000 tax delinquent lots in the county. (At the same ratio the already available home site land would provide for an additional population of about 3,000,000. He also testified that the proportion of all these figures for the vicinity of this farm is higher than for the County as a whole.

For the adjoining County of Summit the amount of farm land available for residence purposes is very much larger. The federal census shows Cuyahoga County, 1930, 1,201,455; 1940, 1,217,250 (an increase of about 16,000 in ten years). Summit County, 1930, 344,131; 1940, 339,405 (a decrease of about 4,000).

Adams
R. 14

Adams had no interest in the case. He has owned farms and been a farmer all his life and still owns over 400 acres. He has offered his farm at $40 to $50 an acre and has not been able to sell it although buyers have looked at it. He has been over the Carter farm and he valued it at $50 an acre or $8418.

Eagle
R. 15 to 16.

Eagle is not interested in the case. He is a farmer and also an appraiser of wide experience for the government and for federal land banks. He took samples of the soil as he does in his official appraisals. He went over every part of the farm and found some good soil. He found much light top soil with a very heavy subsoil that is very poor. Much of it is stony and underlaid with rock. He found about one-third of the peach trees frozen out and without value, leaving but two and two-thirds acres. The house roof is about gone—the shingles curling up. His valuation is $7795 or about $46 per acre.

Huber
R. 17 to 19

Huber had no interest in the case. He has been a farm real estate dealer for more than thirty years and has sold hundreds of farms, many in this community. He went over the farm. It has no scenic value whatever. Because it is situated between the two cities, although he had serious doubts, he added some to what he deemed the real value to be and named $12,040, or $71.66 per acre.

Plechaty
R. 21 to 22

Plechaty has been a farmer for fourteen years. He was a farm real estate dealer for many years in this part of the state. He looked for a farm in the vicinity for himself last year until he bought the Bowman farm nearby.

On the Bowman farm Huber had testified, (R. 19), that "It had about 98 acres and he sold it to Plechaty for $12,000. It had excellent buildings, the barn 'being one that nobody would want to build'. The house has three baths, vapor heat, and is in very good condition. It also had spring water running by gravity right into the barn and house, and in the orchard on out to the creek."

Plechaty has been on the Carter farm and knows it. He knows other farms nearby that are for sale. He values the Carter farm at $6500 to $8500, or about $39 to $50.00 per acre.

The Two Valuation Theories Compared.

There can be but one conclusion in considering these valuations running from $6500 to $12,400 by the disinterested witnesses, and from $29,464 to $37,883 for the mortgage holders. The disinterested witnesses were confronted with the difficult job of fixing the actual value of the farm

as it is now. They were not subject to any other consideration. The mortgage holders' witnesses were thinking of what **the valuation should be in relation to the mortgage claims.** They were concerned with a value that would freeze out the debtor from his right of redemption.

A bankruptcy court can not accede to such a scheme in a farmer debtor proceeding without stultifying the laws of the United States and the decisions of this court.

Was the Error Cured by the District Court's Review?

In the District Court's review the former $5800 appraisal which in the same proceeding had been made by three appraisers and approved by the conciliation commissioner without objection or appeal, was thrown out and disregarded. Statement of the conciliation commissioner: R. 26, bottom of page to top of R. 27. Statement of appraisers, R. 39 to 40. Docket entries: R. 4 to 8 passim. The Judge said: "that value, the Commissioner stated, was made for taxation purposes."

The answer is plain, it was not. The district judge not only failed to cure the error but he made it worse.

The Erroneous Statement that the $5800 Valuation Was for Taxation Purposes.

The judge did not say **when or where** the conciliation commissioner made the statement that the $5800 valuation "was made for taxation purposes." If made, it was made either off the record or in the record. If it was made off the record by the conciliation commissioner in a statement to the judge, verbal or written, it was a further extension in the same direction as the "personal investigation" made by the conciliation commissioner, a method of procedure roundly condemned. It was not

made in the record. The only reference in the record to the former $5800 valuation is contained in the words:

> "At this point at the request of counsel for the debtor, the conciliation commissioner stated that the former appraisement of Carter's farm in these proceedings was $5800." R. 26 to 27.

This categorical statement in the record was never questioned until the judge stated that the commissioner said the $5800 valuation "was made for taxation purposes." The history of that statement is here traced.

(1) The statement just quoted from the record at R. 26 to 27 is part of the narrative statement of the evidence as originally designated on appeal, which was addressed to the appellant, George A. Kubler, now the respondent here. R. 2, paragraph numbered 6. As there stated "One complete transcript of the evidence submitted at the hearing on said reappraisement has been filed with the clerk and one complete copy thereof has been delivered to counsel for said appellee." (George A. Kubler.) The filing of this designation and of this narrative statement is noted on the docket at R. 8 in two entries of January 9, 1942.

Rule 75(c) of the Rules of Civil Procedure provide that:

> "A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof."

This rule has been adopted by the Sixth Circuit to which the appeal was taken. Rule 10 (1) of the Sixth Circuit. No objection, or counter designation, was made by the appellee Kubler now the respondent here.

(2) In the reply brief of the same George A. Kubler, now respondent, filed in the District Court on the petition

for review, in answer to a reference in the petitioner's brief relating to the previous $5800 appraisal the present respondent Kubler accepted the narrative statement as correct. He there referred to it as "a formal estimate of the value of the farm, **made for the purpose of fixing a rental value**". "Taxation purposes" had not then been thought of.

(3) After the statement was made in the judge's opinion that the $5800 was for "taxation purposes" the respondent Kubler in his answer brief on appeal in the Sixth Circuit, for the **first time** represented that the $5800 appraisal was "for taxation purposes". He there said at page 12 of the appellee Kubler's brief in the Sixth Circuit:

> "At page 97 of the original transcript on file in this cause, Mr. McClain, attorney for the appellant, **asked the commissioner as to what the old appraisal referred to and the answers were, 'For tax purposes,' and 'I know I appraised it for taxation'.**"

BUT HE DID NOT QUOTE THE FULL TESTIMONY which shows that the words "For tax purposes" and "I know I appraised it for taxation" were **not uttered by the conciliation commissioner** but by Witness Cochran, the holder of the second mortgage. The following extract from the original transcript of the record at the hearing before the conciliation commissioner demonstrates conclusively that the conciliation commissioner said that the former appraisal in the farmer debtor proceeding was $5800 and that Witness Cochran testified that he knew nothing about the valuation in the farmer debtor proceeding but that he, Cochran, had appraised it for taxation.

Cross examination of Witness Cochran, pages 96 to 97 of the original transcript:

> "Q. You are second mortgagee here on this farm?
> A. Well, I think I am the second mortgagee.

Q. What is the amount of your claim?

A. I think it is something over two thousand.

Q. **And what was this land appraised at before this one hearing to the Conciliator some three years ago?**

Mr. Kimber: Well, I object. I don't know that Mr. Cochran would know.

Mr. McClain: I will ask the Conciliator to state what it was.

The Conciliator: Fifty-eight hundred dollars.

Q. Did you know what that was?

A. For tax purposes.

Q. You didn't know about the values in these proceedings?

A. You mean for taxation?

Q. **Do you know about the values in these proceedings?**

A. **Well, I don't remember about the valuation of the proceedings here.**

Q. **That is all?**

A. **I know I appraised it for taxation.**

Q. Now you spoke about a spring, Mr. Cochran, you know that that spring is at the northwest corner of the farm, that right?

A. Why no, the spring I spoke about is at the southwest corner of the farm. I know there is one at the northwest corner, but I don't think that is on this one hundred and sixty-eight acres now."

The only words spoken by the conciliation commissioner were these: "Fifty-eight hundred dollars" and they were in response to the question: "I will ask the Commissioner to state what it was" (that is, what was the former appraisal in this proceeding?) All reference to taxation was by the witness Cochran who said he had appraised the land. He denied knowing anything about the valuation in the farmer debtor proceeding, saying, "Well, I don't remember about the valuation of the proceedings here."

(4) Some time after April 5, 1943, the day when certiorari was granted, the respondent, George A. Kubler, filed in this court a "Supplemental Brief for Respondent". On page 9 of that Supplemental Brief the subject of the "Fifty-eight hundred dollars" is again mentioned. This time the positive statement previously made to the Court of Appeals is meticulously avoided. The conclusion is inescapable that, if any erroneous conclusion should be drawn from the quoted "record evidence" on page 9 of the Respondent's Supplemental Brief, the respondent, if it be suggested that he is responsible, can say "Thou canst not say I did it"!

When the petitioner applied to the district court to correct the erroneous assumption that the $5800 was for taxation purposes, showing by his own sworn statement and by the affidavits of two of the appraisers who made that appraisal that it was the official valuation made in the farmer debtor proceeding and that it was expressly approved by the conciliation commissioner as being the correct valuation, his application was denied. R. 38 to 41.

Thereby an additional error was committed in throwing aside and disregarding the former official appraisal in the same proceeding.

The "personal investigation" Issue.

On the petition for review the district court not only committed new error by misinterpreting the $5800 valua-

tion and throwing it overboard, refusing to consider it by the remark that the conciliation commissioner made the $5800 for "taxation purposes". It continued the error committed by the conciliation commissioner. It found no fault with the "personal investigation" by the conciliation commissioner although its employment was made the subject of four Specifications of Error in the petition for review and argued to the court. Specifications 5, 6, 7, and 8, found at R. 31.

It may be considered, in extenuation of the countenancing of the extra judicial "personal investigation" on the part of the conciliation commissioner by the district court, that the decision of the Ninth Circuit in *Mosier* v. *Mortgage Company*, 1941, 123 Fed. (2d) 423, reversing a conciliation commissioner and a district judge for its use, had not then been published.

The conciliation commissioner increased his own $5800 valuation four and one-third times to $25,200, based upon his "personal investigation". The district court, on review, threw out of consideration the $5800 valuation but increased it three and one-half times to $20,000. The question then becomes, suppose the conciliation commissioner had repudiated his $5800 valuation and, utterly disregarding it, made his "personal investigation" and found the valuation to be $20,000. The question answers itself. The extra judicial "personal investigation" destroyed all semblance of a judicial hearing. The appraisal upon such a foundation is repudiated whether it be $25,200 or $20,000. The law can not be bought off for $5200. No valuation growing out of a "personal investigation" is judicial. The conciliation commissioner is by mandate of the statute enjoined to fix the valuation **"in accordance with the evidence"** at a **"hearing"**. Instead of doing so

he strayed away from the hearing and constituted himself an **"appraiser"** in violation of the statute. Section 75 (s)(3).

Considered only "in accordance with the evidence submitted".

But let it be supposed that the "$5800" issue and the "personal investigation" issue be disregarded and the evidence itself alone be considered. "In accordance with the evidence submitted" a valuation of neither $25,200 nor $20,000 can reasonably be found. A brief review is sufficient. (1) The respondent's mortgage is $34,702. The second mortgage is $2000. (2) The respondent's evidence runs $33,600, $33,600, $31,290 to $33,600, $29,400, and (from the second mortgage holder) $37,800. (3) One witness is a mortgage holder. One is a bank official who did not go on the farm. One is not a farmer and has not lived on a farm for fifty years. Another did not go on the farm. One had not been on it for three years and another for five years. These were the mortgage holders' witnesses.

On the other hand we have five witnesses, all disinterested. One is a professional site value expert. All four of the others went over the farm recently. Three are farmers. One is a farm dealer operating extensively in the community. One was a farm dealer and now a farmer in the vicinity. One is a professional land bank appraiser and a farmer. Several gave detailed reasons. Their valuations run from $6500 to one of $12,040, which he considers is too high.

A reading of the statements of the ten witnesses discloses the paucity of reasons in the one group and the detailed reasons in the other. If mere computing machine

methods are to determine value, then the "booster of values" may go to the limit—the reasonable evaluator is limited to facts, but not the booster. He well knows that his flights of fancy will raise the calculating machine result. This is not "in accordance with the evidence submitted". The statute does not read: in accordance with the "figures" submitted. Where there is nothing in the case but the statement of the witnesses on hearing judicially conducted and reviewed, it could hardly be said that either $25,200 or $20,000 was in accordance with the evidence submitted.

Therefore the error committed by the conciliation commissioner was not cured, it was not even scotched by the district court's review. It was magnified.

The Appellate Court's "discretion" Theory.

After considerable contemplation of the order of the appellate court at R. 45, no answer has been found to the question, what does it mean? It reads, "there was no abuse of **judicial discretion** in the finding that the reasonable market value of the farm in question was $20,000", R. 45. Is the statement a confusion of the statute as a result of a transposition of the words "in its discretion" in Section 75(s)(3)? The statute reads: . . . "the court shall cause a reappraisal, . . . or **in its discretion,** set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted" . . . The only discretion delegated to the court is the right to choose one of two methods of determining the value, either by appraisers or by a hearing **in accordance with**

the evidence submitted at such hearing. Having proceeded to fix the value by a hearing, it must be determined solely by the weight of the evidence submitted at that hearing. The statute does not read that the conciliation commissioner shall "find" but that he shall fix the valuation "in accordance with the evidence submitted". The law is clear. There is no "discretion" to be exercised.

The "Supplemental Brief for Respondent."

Sixteen days after certiorari was granted in this case counsel for the petitioner received a copy of the "Supplemental Brief for Respondent George A. Kubler, on First Question Presented in Petition of Thad Benson Carter, as Petitioner."

Here that brief will be discussed briefly in the order of its paging.

Page 2 of "Supplemental Brief for Respondent"

The quotation from Section 75(s)(3) omits the words **"in accordance with the evidence submitted"**. The omission makes the statute as so partially quoted seem to countenance a mere "fixing of value" by the conciliation commissioner which is contrary to the statute.

On the same page the statement is made that when the "Judge . . . upon consideration of **all the evidence"** fixes the price, etc. The judge did not consider all the evidence. He threw out of consideration the $5800 valuation by the conciliation commissioner in the same case.

Page 6 of "Supplemental Brief for Respondent"

Whether the statement there made that the "one error question now under consideration was never raised or questioned in any of the proceedings before the district

court", refers to the "$5800" or to the "personal investigation" question, each was specifically raised in the district court. See specifications of errors numbers 5, 6, 7, and 8, at R. 31. Also see the sworn statement of the petitioner and the affidavits of two appraisers at R. 38 to 41.

Page 9 of "Supplemental Brief for Respondent"

The equivocal statement and extracts from the record presented at the above noted page has been fully exposed at pages ~~24 to 27~~ 29 and 30 of this brief.

Page 10 of "Supplemental Brief for Respondent"

There is no difference in principle between the *Moser* case and Mr. Carter's case. Precisely as in the *Moser* case the judge in Mr. Carter's case "without further evidence" acted on the conciliation commissioner's report. In fact the judge here not only took the conciliation commissioner's report without any further evidence but threw part of it out and disregarded it. The point of the *Moser* case, as in this, is that the report of the conciliation commissioner was wholly vitiated by a "personal investigation". A reduction in the finding of the conciliation commissioner by the district judge in the *Moser* case would not have made the illegal "personal investigation" legal. It was the unlawful procedure, not the amount of the valuation which made the conciliation commissioner's report in the *Moser* case void.

CONCLUSION.

The express provision of the statute that valuation shall be fixed in accordance with the evidence submitted at a hearing was violated. The redemption provisions of the statute have been violated.

Due process of law was violated by the personal inves-

tigation of the conciliation commissioner outside of the hearing conducted before him.

The decision of the district court, affirmed by the appellate court, is in conflict with well-considered decisions in other circuits under exactly the same as well as under similar statutes.

The theory that a bankruptcy court has a discretion in fixing the value of a farm for redemption under Section 75 is contrary to that statute.

The result of the decisions of the conciliation commissioner, of the district court, and of the appellate court, so far, is to defeat the purpose of Section 75 as interpreted in numerous decisions of this court.

The orders below should be reversed so that the farmer debtor may have a judicial determination of the valuation of his farm under the redemption provisions of the farmer debtor law.

Respectfully submitted,

Lima, Ohio
September 25, 1942

ELMER MCCLAIN, Lima, Ohio,
Counsel for the Petitioner,
Thad Benson Carter.

In the Supreme Court of the United States

OCTOBER TERM 1942.

No. 750.

In the Matter of
THAD BENSON CARTER,
Farmer Debtor.

THAD BENSON CARTER,
Petitioner,

vs.

GEORGE A. KUBLER,
Respondent.

BRIEF FOR RESPONDENT, GEORGE A. KUBLER, Opposing Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

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BRIEF FOR RESPONDENT, GEORGE A. KUBLER, Opposing Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

I. THE ISSUE.

The question in issue in this cause and in the Courts below was, what is the present fair and reasonable appraised value of the 168-acre Carter farm under Section 75s of the Bankruptcy Act.

On hearing, the Federal District Court, Northern District of Ohio, Eastern Division, Judge Jones presiding, fixed the appraised value of the farm at $20,000.00, approximately $119.00 per acre.

The judgment of the District Court was affirmed by the United States Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio, as more fully hereinafter set forth.

II. ADDITIONAL STATEMENT.

A few additional facts leading up to the present controversy may be helpful to the Court to fully present the present issue.

This cause was first filed in the Bankruptcy Court in the Federal District Court at Cleveland, Ohio, on December 21, 1934.

On July 1, 1929, Carter, the farm debtor, had secured a first mortgage loan on his 168-acre farm at Macedonia, Summit County, Ohio, for $16,000.00 due and payable within three years from said date.

Carter first sought to obtain composition of his creditors under the bankruptcy statute for an extension of time to meet his debt obligations.

Failing to secure such acceptance, Carter, on January 8, 1936, filed his bankruptcy proceedings in such Court under Section 75s of the Bankruptcy Act and applied for, and received by order of the Court, a 3-year moratorium time within which to redeem his farm at the then appraised value.

When the 3-year moratorium period was granted to Carter, he was ordered to pay a certain tax or rental value during the period of the moratorium on the basis of a valuation of the land fixed by the Commissioner appointed by the Court, and in the arrival at the valuation amount the secured creditor had no part, and no opportunity of offering evidence for that purpose was afforded to him.

Following such rental and tax order, Carter, after practically one year, defaulted in the payment of such rental and failed to pay any and all taxes, either delinquent or current, assessed against said farm lands.

After the 3-year moratorium period, the secured creditor in said Federal Court again urged that further proceedings should be had to protect his mortgage lien.

At about that time, and on December 9, 1940, the Supreme Court of the United States, in the case of *Wright*

vs. Union Central, 311 U. S. 273, announced its decision, holding in substance that an opportunity should first be given to a farm debtor to redeem the lands at the value fixed by the Court before a public sale should be ordered.

Thereafter, his Honor, Judge Jones of the United States District Court at Cleveland, Ohio, directed that all subsequent proceedings of this cause were to conform to such opinion, and granted to the farm debtor, as well as to the secured creditor, the right to have the land appraised at its then fair and reasonable market value, with the first right to the farm debtor to purchase it at such appraised value, and, failing to do so, that a public sale of the land then be had.

It should also be stated that, both Carter, the farm debtor, and George A. Kubler, the secured mortgage holder, filed with the Court their application to have the farm appraised.

The Court, considering such two applications, made the following order on March 21, 1941:

> "IT IS THEREFORE ORDERED that this matter be referred to the Conciliation Commissioner who is directed to have a re-appraisement of the farm made and that the secured creditor be afforded an opportunity to present evidence as to the present fair value of such farm and that the Conciliation Commissioner determine the correct appraised value and fix a reasonable time within which the Debtor shall redeem the farm from the mortgage lien, failing in which a public sale is ordered.
>
> (Signed) JONES,
> *United States District Judge.*"

Pursuant to such order, both the farm debtor and the secured creditor offered evidence before the Commissioner as to the then fair and reasonable market value of the farm in question, it being stipulated that five witnesses might be called by either party.

III. FINDING AND JUDGMENT OF THE DISTRICT COURT.

Thereafter, a transcript record of the evidence of the several witnesses, together with briefs by counsel, were submitted to the Court, with the recommendation of the Commissioner that the farm value be found at the rate of $150.00 per acre.

His Honor, Judge Jones, reviewed the evidence and arrived at the conclusion that the fair and reasonable market value of the farm was $20,000.00 ($119.00 per acre).

Inasmuch as the sole and only question, as we view this controversy, is one involving a finding of fact, we submit herewith the opinion of the Court as follows:

"JONES, *J.*:

"This proceeding is to review a reappraisement made pursuant to an order of the Court entered March 21, 1941. The sole question presented is one of fact based upon the Conciliation Commissioner's determination of the fair and reasonable value of the debtor's farm. The Commissioner, after hearing testimony of persons called by the farmer-debtor and the secured creditor, made a finding that the fair and reasonable value of the farm, upon reappraisement, is $150.00 per acre. His order fixing such value was made sometime in August of 1941 and the debtor was given until October 15, 1941, to redeem. The debtor challenges the correctness of the Commissioner's findings principally on the ground that the fair value as found by the Commissioner is far in excess of the present fair and reasonable market value and of the original appraisement made some years before (perhaps three years). However, that value, the Commissioner stated, was made for taxation purposes.

The farm in question is in Macedonia, Summit County, Ohio, at the corner of Ledge and Sheppard Roads, the former being an improved highway and the latter a town line road. It consists of 168 acres-plus and is approximately 18 miles from Cleveland and a little farther than that from Akron, Ohio. There are a house and a barn on the farm and some 40 acres

of timber land. It was stated by one of the witnesses that the buildings are not in very usable condition and that the fences are very ordinary. The values given by the witnesses called by the secured creditor ranged from approximately $29,000.00 to $33,000.00. The values given by the witnesses called for the farmer-debtor were from $6,500.00 to $12,000.00. This is a wide discrepancy, indicating a broad divergence of opinion as to the value of the farm. Thus is presented a difficult situation to those called upon to make a finding of fair and reasonable market value.

After reading the testimony, it does seem to me that the appraisal is high on the basis of today's conditions and market for farm lands located as this one is. True, it is upon a secondary but improved highway and approximately midway between the populous communities of Cleveland and Akron, and it would seem to border on or lie just outside of the so-called Cleveland metropolitan area. The buildings and fences are probably of little value for appraisal purposes and the timber land probably the same.

Giving effect to all elements upon which the evidence rests, I think that the appraisal is somewhat high, but this is not to say or to intimate that either the secured creditor or the Commissioner overreached or attempted to defeat the farmer-debtor in his opportunity or effort for redeeming his farm. A review of the testimony gives the impression that there is not an active market for farm land, in this location at least, although it has improved somewhat within the last two or three years. While it may be possible that the land has a potential value for development into the country place class, if and when conditions favorable for such development return, yet it is to be seriously doubted that such a market value ever will exist and it must be regarded as merely speculative, as matters stand. There are no present or prospective developments to justify a fair market value upon such basis. Generally, the rule is that the fair market value is the price which a willing seller could reasonably expect to obtain from a desirous buyer, neither being under necessity.

Viewing the whole matter in an effort to approach and fulfill the duty of the Court under the statute, I think the fair and reasonable market value of the farm, under the evidence before me, is $20,000.00, and I so find and conclude. Since the original date for redemption fixed by the Commissioner expired on October 15, 1941, a new date is hereby fixed. The debtor is given until December 15, 1941, to redeem, failing in which the property shall be sold at public sale.

JONES,
U. S. District Judge.

November 7, 1941."

Such finding and judgment of the Court was journalized November 17, 1941.

Upon application by the attorney for the farm debtor for rehearing, the Court, on December 9, 1941, adhered to his former order and judgment.

IV. THE JUDGMENT OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Counsel for the farm debtor filed his notice for appeal of this cause from the District Court to the United States Circuit Court of Appeals, Sixth Circuit, Cincinnati, Ohio.

The brief filed in that appellate Court on behalf of the farm debtor urged substantially the same reasons and argument as is set forth in the brief filed in this Court for an order of certiorari.

The appellate Court affirmed the judgment of the Federal District Court without written opinion.

In the Order of that Court of October 14, 1942, is the following:

"Before: Hicks, Simons and Martin, Circuit Judges.

This cause was heard upon the transcript of the record, briefs and arguments of counsel, and it appearing that there was no abuse of judicial discretion in the finding that the reasonable market value of the farm land in question was $20,000, and no reversible error appearing,

IT IS ORDERED AND ADJUDGED that the judgments and orders appealed from be and the same are in all things affirmed.

Approved for Entry:

XEN HICKS,
Circuit Judge."

We might state also that after the judgment of affirmance, counsel for Carter, the farm debtor, filed his written application for rehearing in the Circuit Court of Appeals and that Court refused to grant any such rehearing and adhered to its former judgment.

V. REPLY ARGUMENT.

On behalf of the secured creditor, George A. Kubler, we do not deem it helpful or advisable, considering the question of fact in issue in this cause, to attempt to reply to all of the presented statements and claimed arguments of counsel for the farm debtor.

Counsel for the farm debtor, in his brief pages 17 to 21 inclusive, under the heading, "Devices to Defeat the Purpose of the Law," and throughout practically all parts of such brief, has charged bad faith on the part of counsel for the secured creditor, the witnesses who testified as to the value of the farm for the secured creditor, the Commissioner before whom the evidence was ordered to be taken, and of the District Court who carefully reviewed all such evidence and fixed and determined the appraised value of the farm, at which price the farm debtor could redeem the same, and failing to do so that a public sale of the farm should be ordered.

Inasmuch as such accusations were likewise urged in the brief of such counsel in the Courts below, and inasmuch as such claims are unsupported by the record evidence, we do not deem it necessary to reply to same.

May we reply to a few of the many assertions made and urged in the brief on behalf of the farm debtor.

1. 1936 Appraisement.

Throughout practically all portions of such brief, comment is made as to the appraisal made by the Commissioner in 1936 for rental and tax purposes during the 3-year moratorium period.

The farm debtor was ordered to pay $150.00 each six months for the reasonable use of the farm lands, and which rental, after about a year and a half from its date, the farm debtor failed to pay.

The rental valuation of $5,800.00 at that time served its purpose, or partly so, and such valuation had nothing to do with the later appraised valuation of the farm for redemption or sale purposes.

Neither counsel for the farm debtor nor counsel for the secured creditor submitted evidence before the Commissioner when such rental valuation was arrived at by the Commissioner, and such proceeding was wholly an ex-parte matter handled by the Commissioner.

2. Statement Made in Commissioner's Report.

Another question is urged throughout opponent's brief to the effect that the Commissioner, in reporting the evidence to the Court for the Court's consideration and judgment, stated in such report that he had also made a personal investigation of the value of the farm, and that by reason of such statement it is urged that all of the subsequent proceedings by the Courts in this cause should be nullified and held to be illegal.

Counsel for the farm debtor is well aware of the real fact that the finding and judgment of Judge Jones is based solely on the evidence as stated in his opinion, and that the same in no respect is based on any statement contained in the Commissioner's report.

3. Time for Redemption.

In several portions of opponent's brief complaint is made that the time stated by the Court for redemption at the appraised value was inadequate and did not afford the farm debtor sufficient opportunity to arrange for such purchase.

Since the farm debtor has continuously contested all orders and judgments made by the Court since the appraised value in 1941 was fixed by the Court, and since a subsequent date would need to be fixed by the trial Court for such redemption, all argument relative to this objection is, as it were, "water over the dam," and, therefore, of no present importance.

VI. EVIDENCE AS TO VALUATION.

For the purpose of considering this petition for writ of certiorari, it may be of no consequence to the Court to have presented any further facts as to the evidence of various witnesses called before the Commissioner for that purpose.

Certainly the evidence was greatly in conflict, and as stated early in this brief, the issue presented to the Court was as to the weight of such evidence.

The record shows that the secured creditor offered four of the five witnesses who were farmers and owners of farms residing in the general vicinity of the Carter farm. They were Walter H. Chamberlain, Russell Osborn, Gilbert L. Huddilston, and H. A. Cochran.

The fifth appraiser was D. A. Scanlon, who for eight years had been an appraiser for the Probate Court of Summit County, Ohio, and also one of the official appraisers for the Sheriff of Summit County, as well as an appraiser for village and city properties.

The witness Chamberlain also in addition to his farm duties was a director of the Northfield Bank in Macedonia and of the Twinsburg Bank, and as such director acted as

one of the appraisers for such banks of farm and village values in the surrounding territory of the Carter farm.

The record also shows that Mr. Huddilston, in the placing of the value of $175.00 per acre, stated that he would pay cash $150.00 per acre for the farm, and that he would expect to make some profit at that price.

The record also shows that Mr. Cochran, in fixing the value of the farm at $200.00 to $225.00 per acre, likewise stated that he would pay cash for such farm at the rate of $175.00 per acre.

The final price fixed in this appraisement by the Court was $119.00 per acre.

Some complaint is made in opponent's brief that some reference was made before the Commissioner that taxes on the farm had not been paid, and that the total indebtedness to the secured creditor then far exceeded the various appraised values, and in that connection may we state that there is absolutely no evidence that any witness to the appraisal value of the farm had any knowledge or information as to the amount of Carter's mortgage debt nor as to the delinquent taxes due on the farm.

VII. CONCLUSION.

In conclusion, may we respectfully submit on behalf of the respondent that since Mr. Carter has held and resided on the farm in question for more than eight years since these bankruptcy proceedings were instituted and has reaped the benefits and income from the use of such farm, and that he has not paid a cent of interest on this mortgage obligation since September, 1931, and that there has been no reduction of the mortgage debt since that time, and that taxes and rental value fixed in 1936 were not even paid, it is certainly not unreasonable, or in derogation of the farm debtor's rights, to have this litigation concluded.

The farm debtor, under the judgment of the Court, has the first right to take the farm in question free of all

claimed indebtedness at the appraised value of $20,000.00, and if such right of purchase be not exercised, then that the farm shall be sold at public sale in accordance with the Bankruptcy Act.

May we further state and submit that all of the just and legal rights of the farm debtor have been carefully and zealously protected by the Court throughout all of this bankruptcy proceeding.

We submit, also, that the rights of the mortgagee, whose money has staked and financed the farm debtor for all these years, are also of equal importance and consideration.

We, therefore, respectfully submit that the writ of certiorari should not issue.

Respectfully submitted,

T. W. KIMBER of

MUSSER, KIMBER & HUFFMAN,

Attorney for Respondent,
George A. Kubler.

February 26, 1943.

In the Supreme Court of the United States

OCTOBER TERM 1942.

No. 750.

In the Matter of
THAD BENSON CARTER,
Farmer Debtor.

THAD BENSON CARTER,
Petitioner,

vs.

GEORGE A. KUBLER,
Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT, GEORGE A. KUBLER,

On First Question Presented in Petition of Thad Benson Carter, as Petitioner.

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In the Supreme Court of the United States

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GEORGE A. KUBLER,
Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT, GEORGE A. KUBLER,

On First Question Presented in Petition of Thad Benson Carter, as Petitioner.

CERTIORARI GRANTED.

On April 5, 1943, petitioner's request for writ of certiorari was granted in this cause.

On April 6, 1943, the following direction and order from the Clerk of this Court, Charles Elmore Cropley, was submitted to counsel for the respondent:

> "In the case of Carter v. Kubler, No. 750, October Term, 1942, the Court today granted the petition for writ of certiorari, limited to the first question presented by the petition, and the case is transferred to the summary docket. Counsel are requested to discuss in their briefs and on the oral argument the question whether the error, if any, was cured by the District Court's review."

Inasmuch as the parties are now limited by the Court to Part One of the petition of the farmer debtor, we respectfully ask leave herewith to submit to the Court this supplemental brief.

THE ONE QUESTION IN ISSUE.

An examination of the record and briefs filed before the granting of certiorari by this Court, and on direction of this Court the one question now to be considered is, Does the alleged irregularity in the conduct of a Commissioner in collecting and reporting evidence to a Judge of the U. S. District Court in relation to proceedings had under the provisions of the Bankruptcy Act, Sec. 75 (s) (3), which states:

> "Upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property * * *."

for the purpose of fixing the price at which a farmer debtor may redeem, constitute prejudicial error when the Judge, on a review of the report of such Commissioner and upon due consideration of all the evidence, fixes the price at an amount substantially less than the amount recommended by the Commissioner and renders his judgment accordingly, without objections or exceptions thereto by the farmer debtor based on such alleged irregularity?

The Commissioner's recommendation was $150.00 per acre—aggregating $25,200.00.

The judgment of the Court as to the reappraised value of the farm was $20,000.00, or at the rate of $119.00 per acre.

On page 9 of the record, the full report of the Commissioner is shown, and in such report is the following statement:

"After hearing the testimony given by the several witnesses, and studying the briefs furnished by the defendant and the plaintiff, and upon a personal investigation by the Conciliation Commissioner of the value of said farm, I hereby fix the value of said farm at $150.00 per acre."

THE RECORD FACTS AS TO THIS CLAIMED ERROR.

In our brief for the respondent opposing writ of certiorari, at pages 4 to 6 inclusive, the finding of his Honor, Judge Jones, of the District Court, is set forth. We now submit the judgment of the Court as evidenced by the Journal Entry.

"This cause came on for hearing on petition for review filed on behalf of the farmer debtor, Thad Benson Carter, for a review of the order of the conciliation commissioner finding the present fair and reasonable market value of the farm land in question and fixing a date for redemption, and upon the record, evidence, and the arguments of counsel for the parties, and was submitted to the court.

Upon consideration thereof the court finds that the present fair and reasonable market value of the said land is twenty thousand dollars ($20,000).

The court therefore finds, orders, and adjudges that the present fair and reasonable market value of said farm land is twenty thousand dollars ($20,000).

The court, considering further the question as to the period of time within which the farmer debtor may redeem said described land at said valuation, grants said farmer debtor the right to redeem said farm land until December 15, 1941.

It is the further order and judgment of the court that if said farmer debtor shall not redeem said land on or before December 15, 1941, that said farm land shall be sold at public sale according to law.

(Signed) JONES,

Judge."

This Journal Entry was filed November 17, 1941, as shown on page 8 of the "Transcript of Record."

The Application for Rehearing, omitting formal parts, is as follows:

> "Now comes the farmer debtor, Thad Benson Carter, and applies to the court for a rehearing of the matter which was the subject of the Journal Entry of this court entered November 17, 1941, reading as follows:
>
> (Said Journal Entry is then set forth, and the Petition for Rehearing continues:)
>
> This petition for rehearing is presented for the consideration of the court for the reason that in the court's memorandum on the subject of the order preceding the entry of said order, which memorandum was filed on or about November 7, 1941, it was said in said memorandum concerning the valuation of $5800 originally placed upon the real estate in question by the conciliation commissioner: 'However that value, the commissioner stated, was made for taxation purposes.'
>
> Thad Benson Carter, the said farmer debtor, respectfully represents to the court that the original valuation of $5800 was, in the opinion of the conciliation commissioner, the fair and reasonable market value of the said real estate when such valuation was made."

Two affidavits, ex parte in character, are then attached, purporting to show that the former appraisement, made some four or five years prior to the appraisal in question for tax or rental purposes, was as to the fair value of the farm.

Such Petition concludes as follows:

> "Wherefore the said Thad Benson Carter, farmer debtor herein, prays the court to rehear the said matter; to reverse the order of the said conciliation commissioner which is the subject of his petition for review herein and that he may have such relief as he may be entitled to in equity and justice.
>
> (Signed) THAD BENSON CARTER,
> *Farmer Debtor.*"

JUDGMENT ON REHEARING APPLICATION.

The Petition for Rehearing was disposed of as follows:

"In the Matter of
Thad Benson Carter
Debtor No. 33696

APPLICATION FOR REHEARING

RULING: 'Upon due consideration, application denied.'

Dec. 9, 1941 JONES,
Judge."

NOTICE OF APPEAL.

Thereafter, and on December 15, 1941, the Notice of Appeal, filed in the United States District Court, with copies to attorneys of record, was as follows:

"Notice is hereby given that Thad Benson Carter, the farmer debtor above named, hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit

(1) From the final order and judgment on the petition for review of the order of Harry E. Wood finding that the present fair and reasonable market value of the farmer debtor's farm land is $20,000, and that said farm land shall be sold at public sale according to law if said farmer debtor shall not redeem said land on or before December 15, 1941, entered in this action on November 17, 1941; and

(2) From the final order and judgment entered in this action on December 9, 1941, denying the application of Thad Benson Carter for rehearing of said final order and judgment entered in this action on November 17, 1941.

Lima, Ohio. ELMER MCCLAIN and
LEON N. STONE,
Lima, Ohio,
Attorneys for the Appellant,
Thad Benson Carter."

Such various docket entries are referred to in "Transcript of Record" at page 8.

THE PRESENT ERROR QUESTION NOT RAISED IN THE TRIAL COURT.

The one error question now under consideration was never raised or questioned in any of the proceedings before the District Court or before the Commissioner appointed by the Court to hear and to submit to the Court the evidence on the question of the reappraised value of the farm.

The first intimation of any claimed error as to the one statement made by the Commissioner in his report to the Court, which is now claimed as error, appeared in the brief submitted on behalf of the farmer debtor to the United States Circuit Court of Appeals.

In other words, this Court is now asked to determine a question of error which was in no manner presented to the trial court, and which claimed error for the first time was urged in the reviewing court.

No objections or exceptions on this question of any kind were noted in any of the proceedings before the District Court, and hence the District Judge had no opportunity to consider or to correct the claimed error.

REVIEW OF CLAIMED ERRORS OF THE TRIAL COURT.

We submit that reviewing courts have repeatedly announced and held that objections to any questionable matter in the record evidence should be raised in the trial court, and that such question cannot be raised for the first time in the reviewing court.

This Court is now asked to find error as to a question not urged or considered by the Trial Judge.

In 1856, in the case of *McMicken vs. Perin*, 59 U. S. (18 Howe) 507, opinion of the Court by Mr. Justice Campbell, it was held:

> "The Supreme Court of the United States will not review a Master's report upon objections first taken in that Court on appeal."

In re *Elliott, International Harvester Co. of America vs. Schmidt*, 72 Fed. (2nd) 300, decision of the Circuit Court of Appeals of the Eighth Circuit in 1934, it is held:

> "4. Assignment of error on appeal from District Court's judgment affirming order of Referee in Bankruptcy could not be considered, where transcript shows that question presented by assignment was not submitted to Referee or District Court."

In *Hawke vs. Service Products Corp., et al.*, 93 Fed. (2nd) 710, the Circuit Court of Appeals, Sixth Circuit, in 1938 held:

> "1. Appellate Courts do not presume error, but grant relief only where it is affirmatively made to appear that error has been committed."

Petition for certiorari in this cause was denied by this Court March 13, 1939.

In *Mercantile Trust Co. vs. Hensey*, 205 U. S. 298, this Court, opinion delivered by Mr. Justice Peckham, held:

> "It is for the plaintiff in error to show affirmatively that error was committed, it is not to be presumed and

will not be inferred from a doubtful statement in the record."

On question of Appeal and Error, 2nd *Cyc.*, page 703, it is stated:

"Objections to the report of a referee, auditor, or master, when made for the first time on appeal, will not be considered."

Citing supporting authorities from the Supreme Courts of many different States of the Union.

In the case of *Stephenson vs. State*, 119 Ohio State 349, the Supreme Court of Ohio, in 1928, held:

"3. Except where the jurisdiction of the trial court over the subject-matter of the action is involved, assignments of error in a petition in error filed in a reviewing court reach only alleged errors of law where objections were made and exceptions reserved in the trial court, and such reviewing court will only consider and determine alleged errors of law where the questions involved were raised and determined in the court of first instance."

ARGUMENT.

We submit that at times a referee, a special master, or a commissioner, may make a statement to the Court in his report or recommendation extraneous to the evidence. In such instances, the Court considers only the competent and relevant evidence and ignores the irrelevant and any such incompetent statement.

We submit also that at times when hearings are before the Court and when questions of the competency of certain offered evidence is presented, the Court will hear the offered evidence and later will disregard such proffered evidence and will consider only competent evidence, and reviewing courts do not find that error has intervened in such instances.

We submit, that it is the pronounced judgment of the District Court, Judge Jones, as evidenced by the Court's

Entry, *supra*, that is here for review, and not any statement made in the Commissioner's report to the Court, and we respectfully submit that the scope of review is limited by the nature and character of the decision of the Court below.

We further submit that the original Transcript Record of the evidence at pages 96 and 97, on file in this cause, shows that counsel for the farmer debtor first sought to elicit some appraisal opinion from the Commissioner over the objection of counsel for the secured creditor, the respondent herein.

Such record evidence is as follows:

Cross Examination by Mr. McClain of Mr. Cochran, a witness called on behalf of the secured creditor.

Mr. McClain, question to Mr. Cochran:

"Q. And what was this land appraised at before this one hearing to the Conciliator some three years ago?

Mr. Kimber: Well, I object. I don't know that Mr. Cochran would know.

Mr. McClain: I will ask the Conciliator to state what it was.

The Conciliator: Fifty-eight hundred dollars.

Q. Did you know what that was?

A. For tax purposes.

Q. You didn't know about the values in these proceedings?

A. You mean for taxation?

Q. Do you know about the values in these proceedings?

A. Well, I don't remember about the valuation of the proceedings here.

Q. That is all?

A. I know I appraised it for taxation."

Such inquiry, of course, was objectionable, as the Commissioner was not a witness.

However, the personal element of value by the Commissioner was thus erroneously injected into the record by the party now urging error to a[illegible]er statement, personal in character, made by such Commissioner to the Court.

It may well be inferred that such statement by the Commissioner was prompted by such inquiry, and we submit that under such circumstances the offending party cannot now seek to take any advantage of any such error.

AUTHORITIES CITED BY PETITIONER.

In the petitioner's brief for writ of certiorari, the case of *Moser, et al. vs. Mortgage Guarantee Co.*, 123 Fed. (2nd) 423, is cited and it is urged that it is authority for a reversal of the judgment of the Court in the instant case.

We submit that the *Moser* case is not in point and is clearly distinguishable from the facts in the instant case. In the opinion in the *Moser* case it is stated:

> "The Judge of the Bankruptcy Court, upon review of the proceedings, received the transcript of such hearing with the Commissioner's certificate, and without further evidence approved and confirmed the Commissioner's conclusion as to the value of the farm."

In the opinion of such case, it is further shown that an appraiser, who was appointed for that purpose, fixed and duly reported the value of the farm to be $9,000, and it is stated that the Commissioner, on his own volition, stated:

> "After hearing all parties in interest and their appraisers, and after making a personal visit to the ranch and looking the property over, and I talked to other property owners in the vicinity, I came to the conclusion that the property was worth Twelve Thousand Dollars ($12,000), and that is my finding, and I accordingly fixed the value at the said amount."

The Judge of the Bankruptcy Court, as shown by the opinion, merely adopted and affirmed such recommendation of the Commissioner, and the reviewing court held that

the appraisal value was that of the Commissioner, rather than that of the appraiser.

A very different state of facts is shown by the record in the instant case.

The other authorities cited are not in point.

CONCLUSION.

We respectfully submit that (1) since the judgment of the trial court is for review and not any statement made by the Commissioner, and (2) since no objection or exception to any statement made by the Commissioner was made or urged in the District Court, and (3) since reviewing courts do not consider errors not urged and considered in the trial court, and (4) since the record shows that the personal opinion of the Commissioner was first erroneously injected into these proceedings by the petitioner herein, and (5) since the record shows that the District Court's judgment was fair, just, and considerate, both to the farmer debtor and to the secured creditor, and that such judgment was in accord with the provisions provided in this portion of the bankruptcy law, this Court should affirm the judgments of the Courts below.

Respectfully submitted,

T. W. KIMBER of

MUSSER, KIMBER & HUFFMAN,

Attorney for Respondent,
George A. Kubler.

Office - Supreme Court, U. S.
DEC 2 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

NO. 18

THAD BENSON CARTER, *Petitioner,*

vs.

GEORGE A. KUBLER, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 18

THAD BENSON CARTER, *Petitioner,*

vs.

GEORGE A. KUBLER, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

To the Honorable Justices of the Supreme Court of the United States:

The petitioner respectfully presents his petition for rehearing:

I.

The Issue.

The issues are two:

First, was it error under Section 75 (s)(3) of the Farmer Debtor Statute for a conciliation commissioner to fix a valuation partly on the basis of his personal investigation?

This court finds that it was error.

Second, was that error cured on review by the Judge of the District Court?

This court finds that it was cured.

II.

The Reason for This Petition for Rehearing.

The petitioner respectfully submits that the error was not cured on review.

The opinion of this court finds, and from the undisputed evidence it could not be found otherwise, that the farm was valued at $5800 at the beginning of the proceeding. The district judge threw that evidence out of the window and utterly disregarded it.

The statute provides but one basis for valuation, applying equally to the valuation at the beginning, and at the end, of the proceeding. That basis is explicit, in five words that require no construction, namely: its "fair and reasonable market value". Section 75 (s), first (unnumbered) paragraph. There is no evidence at all in the rec-

ord showing, or claiming to show, any increase in value during the three years between the two valuations.

New Error Committed.

The statute in equally explicit words prescribes exactly how the revaluation, if requested, shall be determined at a hearing, namely: the court shall "fix the value of the property, in accordance with the evidence submitted." Section 75 (s) (3).

The district judge on review disregarded entirely the prescription that the value must be fixed "in accordance with the evidence submitted." He threw out of all consideration the valuation of $5800 upon the erroneously assumed ground that it did not apply to the proceeding at all. Therefore he did not fix the value "in accordance with the evidence submitted" because part of the evidence submitted to him was the court's own official valuation of $5800 in the same proceeding. He considered only what was left of the evidence submitted after he threw out part of it.

It was in accordance with only a **part** of the evidence that the value was fixed on review and in violation of the statutory plain mandatory provision that the court shall fix the value in accordance with the entire evidence, **not a part of it.**

It would have been no more erroneous if the whole of the petitioner's evidence had been so disregarded. The evil was done and the result speaks for itself.

The Result of the Error.

In its practical effect the result is to deprive the farmer debtor of all opportunity to redeem his farm as the statute

purposes. Whether $20,000 or $25,000 is set as the price of his redemption, makes no difference. It may just as well be fixed at a million dollars. Either of the three figures, $20,000, $25,000, or $1,000,000, equally shut the door of redemption tight against the farmer debtor. And, as Lincoln said, "the law is cheated." A perusal of the evidence, even without the $5800 item, unerringly leads to this conclusion.

Therefore the petitioner respectfully submits that this case ought to be reheard and upon rehearing remanded to the District Court with instructions to fix the value in accordance with the evidence submitted as prescribed by the mandatory statute.

Respectfully submitted,

ELMER MCCLAIN, Lima, Ohio,
WILLIAM LEMKE,
Fargo, North Dakota,
Counsel for the Petitioner,
Thad Benson Carter.

Lima, Ohio
November 24, 1943

Certificate of Counsel.

I certify that the foregoing petition for rehearing is filed in good faith and not for delay.

ELMER MCCLAIN, Lima, Ohio,
Counsel for the Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 18.—October Term, 1943.

Thad Benson Carter, Petitioner,
vs.
George A. Kubler.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 8, 1943.]

Mr. Justice Murphy delivered the opinion of the Court.

The narrow issues presented by this case are whether it was error under § 75(s)(3) of the Bankruptcy Act[1] for a conciliation commissioner to fix a valuation partly on the basis of his personal investigation and, if so, whether that error was cured on review by the District Court.

Petitioner, the farmer debtor, was adjudicated a bankrupt under § 75(s). After a $5,800 appraisal of his farm had been approved by a conciliation commissioner, petitioner was permitted to retain possession of the property for the statutory three year period. At the end of that time, he petitioned the District Court for a reappraisal of the property for redemption purposes, pursuant to § 75(s)(3).[2] The judge then referred the matter to the same conciliation commissioner who had approved the original appraisal and directed that he "have a reappraisement of the farm made and that the secured creditor be afforded an opportunity to present evidence as to the present fair value of such farm and that the conciliation commissioner determine the correct appraised value and fix a reasonable time within which the debtor shall redeem the farm from the mortgage lien, failing in which a public sale is ordered."

Pursuant to this order, the conciliation commissioner held hearings to determine the fair and reasonable value of the farm

[1] 11 U. S. C. § 203(s)(3).

[2] The pertinent portion of § 75(s)(3) provides that "upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court . . . and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor."

in question. Respondent, the secured mortgage holder, called five witnesses whose estimates of the value of the farm ranged from approximately $29,000 to $33,000. The values given by petitioner's five witnesses were from $6,500 to $12,000. All but one of these witnesses were subjected to cross-examination. Subsequently, the conciliation commissioner made the following finding: "After hearing the testimony given by the several witnesses, and studying the briefs furnished by the defendant and the plaintiff, and upon a personal investigation by the conciliation commissioner of the value of said farm, I hereby fix the value of said farm at $150 per acre [approximately $25,000 for the entire farm]." The commissioner did not indicate when or under what circumstances his personal investigation had been made.

Petitioner then requested the District Court to review and reverse the commissioner's order allowing him to redeem the farm on payment of $25,000. Included in the specification of errors was the claim that the valuation was erroneous and void "because made and fixed by the conciliation commissioner upon a personal investigation . . . made outside of and independent of the hearings . . . at which personal investigation neither the petitioner herein nor his counsel was afforded opportunity to offer counter evidence or to cross-examine concerning the evidence adduced by said personal investigation." The District Court, after reviewing the entire testimony introduced at the hearing before the commissioner and after reading the briefs submitted by the parties, concluded that the commissioner's estimate was too high and reduced the valuation to $20,000. It does not appear that the District Court made any use or mention of the commissioner's personal investigation in arriving at this valuation or that any evidence was utilized other than that properly introduced at the hearing before the commissioner.

Petitioner renewed his objection to the personal investigation in his appeal to the Circuit Court of Appeals. The latter, however, merely stated that there was no abuse of judicial discretion by the District Court in fixing the valuation at $20,000 and that there was no reversible error. 131 F. 2d 222. We granted certiorari, limited to the question of the propriety of the commissioner's personal investigation, because of an asserted conflict with *Moser v. Mortgage Guarantee Co.*, 123 F. 2d 423.

We are of the opinion that the conciliation commissioner erred in fixing the value of the property partly upon his personal investigation, but that, under the circumstances of this case, such error was cured inasmuch as the District Court reexamined all the evidence properly introduced at the hearing before the commissioner and thereupon modified the latter's valuation.

Section 75(s)(3) makes clear the impropriety of the conciliation commissioner's action. If the District Court conducts a hearing to determine the value of the property or if the conciliation commissioner is authorized to hold such a hearing, the statute provides that the valuation shall be fixed "in accordance with the evidence submitted" at the hearing. The statute confers no authority on either the judge or the commissioner to act personally as an appraiser or to conduct his own factual inquiry absent the knowledge and consent of the parties to the hearing. The valuation must thus be determined solely from the evidence adduced at the hearing and the use of evidence obtained in any other manner is improper. *Moser* v. *Mortgage Guarantee Co., supra; Equitable Life Assurance Society* v. *Deutschle*, 132 F. 2d 525. And the parties are entitled to a valuation based on a strict adherence to this orderly procedure. *John Hancock Mutual Life Insurance Co.* v. *Bartels*, 308 U. S. 180; *Borchard* v. *California Bank*, 310 U. S. 311.

Moreover, once a hearing has been ordered, § 75(s)(3) necessarily guarantees that it shall be a fair and full hearing. The basic elements of such a hearing include the right of each party to be apprized of all the evidence upon which a factual adjudication rests, plus the right to examine, explain or rebut all such evidence. Tested by that standard, the personal investigation by the conciliation commissioner cannot be justified. It was apparently made without petitioner's knowledge or consent and no opportunity was accorded petitioner to examine or rebut the evidence obtained in the course of such investigation. The use of this evidence was therefore inconsistent with the right to a fair and full hearing. *Moser* v. *Mortgage Guarantee Co., supra*, Wigmore on Evidence, § 1169 (3rd edition).[3]

[3] See also Atlantic & B. Ry. Co. v. Mayor of City of Cordele, 125 Ga. 373, 54 S. E. 155; Ralph v. Southern Ry. Co., 160 S. C. 229, 158 S. E. 409; Denver Omnibus & Cab Co. v. J. R. Ward Auction Co., 47 Colo. 446, 107 P. 1073; Elston v. McGlauflin, 79 Wash. 355, 140 P. 396; Anderson v. Leblang, 125 Misc. 820, 211 N. Y. S. 613.

The irregularity of the commissioner's personal investigation, however, appears to have been cured by the District Court's review and modification of the commissioner's valuation. Order 47 of the General Orders in Bankruptcy,[4] which is applicable to the review of the commissioner's valuation,[5] provides in effect that the commissioner's findings of fact shall be accepted by the judge "unless clearly erroneous." Order 47 further provides that "the judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

Had the District Court done no more than summarily affirm and adopt without change the commissioner's finding of a $25,000 value, the defect upon which that finding rested would not have been cured and petitioner would have been deprived of the fair hearing to which he was entitled. *Moser* v. *Mortgage Guarantee Co., supra.* But here the commissioner's error was brought to the judge's attention by petitioner and we cannot assume that the judge was unmindful of this objection. The District Court disregarded the commissioner's $25,000 valuation, heard argument by counsel, made an independent and complete review of the conflicting evidence introduced at the hearing before the commissioner, and fixed the valuation at $20,000 "under the evidence before me." All of this was authorized by Order 47 inasmuch as the commissioner's personal investigation made his finding as to value "clearly erroneous."

It is thus apparent that the error of which petitioner complains was cured by the District Court. Since none of the evidence procured by the commissioner through his personal investigation was included in the record certified to the judge, it cannot be said that the judge's $20,000 valuation was in any way grounded on such improper evidence. Petitioner had full opportunity to examine and rebut all the evidence utilized by the judge in fixing this valuation.

This procedure, furthermore, gave petitioner the full and fair hearing guaranteed to him by Congress. If the conciliation commissioner is properly authorized to conduct a reappraisal hear-

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[4] 11 U. S. C. following § 53.

[5] Sec. 75(s)(4) of the Bankruptcy Act, 11 U. S. C. § 203(s)(4); Order 50(11) of the General Orders in Bankruptcy, 11 U. S. C. following § 53; Equitable Life Assurance Society v. Carmody, 131 F. 2d 318, 322; Rait v. Federal Land Bank of St. Paul, 135 F. 2d 447, 450.

ing and commits an error which can be and is corrected by the District Court on appeal, the hearing contemplated by § 75(s)(3) has been had. A party is not entitled to a trial de novo as of right on the review in the District Court, *Equitable Life Assurance Society* v. *Carmody*, 131 F. 2d 318, and none was requested by petitioner. Nor is there any requirement that the judge must reverse and remand the case to the commissioner for further hearings or for his considered judgment based solely on the competent evidence. To so hold would render nugatory the discretionary power given the judge by Order 47 to receive further evidence himself or to modify or reject, in whole or in part, the commissioner's findings on appeal. In addition, it would make mandatory what is at most a discretionary power of the judge under § 75(s)(3) to authorize a hearing before the commissioner.

The judgment below is accordingly

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.